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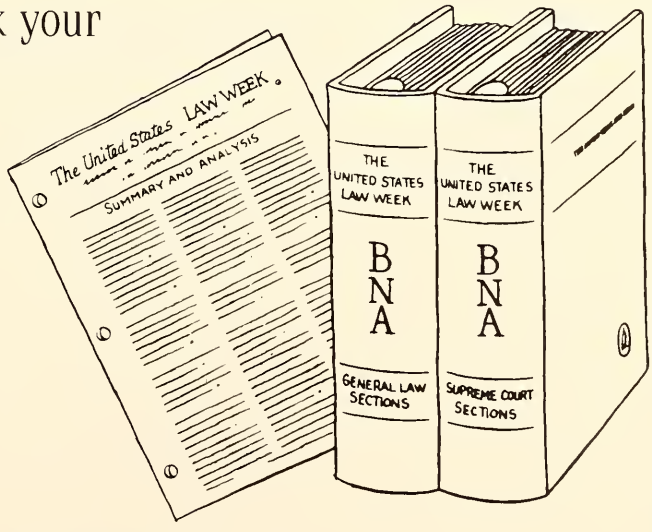

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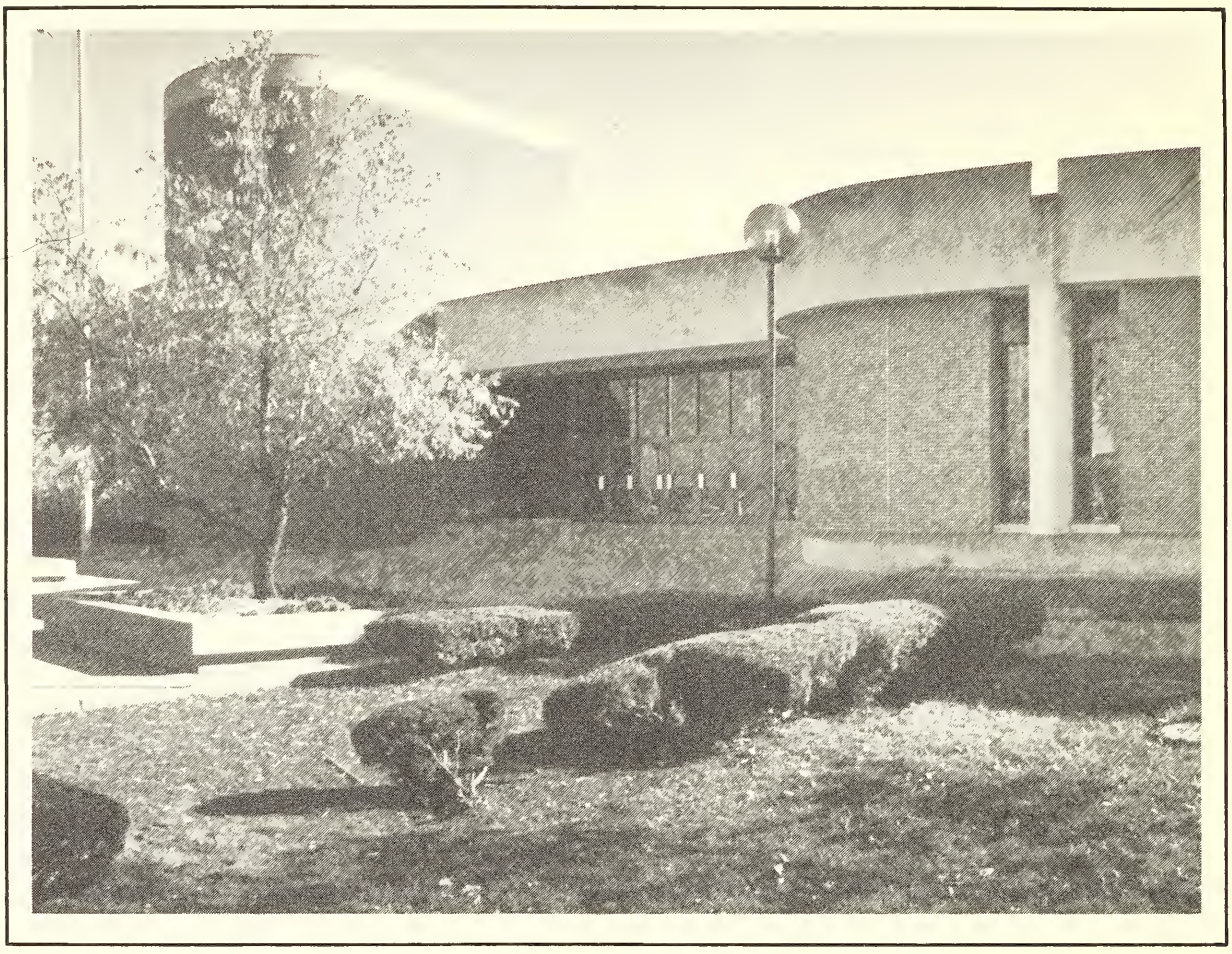

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ARTICLES

Disclosing Adolescent Suicidal Impulses to Parents: Protecting the Child or the Confidence?

Joan Neisser*

Introduction—The Tale of Alana

This Article is about the intersection between law and psychology in the troubling area of adolescent suicide. It focuses on the appropriate role of the suicidal adolescent's parents in the treatment and recovery of the adolescent. Adolescent suicide is a problem of enormous and increasing magnitude in our society today. There are now approximately 6,000 successful suicides and a half-million suicide attempts a year by young people.[1] Every day, mental health professionals[2] in clinics, schools,

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* Assistant Professor, Seton Hall University School of Law. B.A., 1970, Rutgers University; J.D., 1984, Stanford Law School. I wish to thank Catherine McCauliff and Louis Raveson for their invaluable assistance and support. I also wish to thank Angela Carmella, Maureen Garde, Stephanie Wildman, and Michael Zimmer for their helpful comments. Finally, I would like to thank Edward McHugh, Jodelyn Shack, and Linda Vele for their helpful research assistance.

1. These statistics are for youths ages 15-24. Herbert Pardes, M.D., *Foreword* to Youth Suicide at vii (Michael L. Peck, et al. eds., 1985).

2. I am using the term mental health professional to refer to any professional licensed to provide mental health counseling. There are many other individuals, such as teachers, who come in contact with potentially suicidal adolescents. One commentator has suggested that there should be a general duty imposed on bystanders who have firsthand knowledge of suicidal threats by individuals of any age to report this information to a hotline serviced by mental health professionals. *See* Kate E. Bloch, Note, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 Stan. L. Rev. 929 (1987). This Article, however, focuses on situations where a licensed mental health professional learns of an adolescent's suicidal impulses through the adolescent's confidential relationship with the mental health professional.

and private offices have contact with adolescents who are potentially suicidal. In light of the psychological research and clinical experience that calls for parental involvement with the treatment of the suicidal adolescent, the question arises whether mental health professionals should be permitted to notify parents that their child is suicidal over the child's objection.

The story of one suicidal adolescent, Alana,[3] demonstrates the complex family dynamics in which the suicidal adolescent is usually involved. Alana became increasingly depressed during her early teenage years. She had been adopted at the age of two months, and she became increasingly concerned about why her biological parents had given her up. In addition, she became increasingly dissatisfied with her body, as she was only four feet, seven inches tall, and, because of a medical condition, would not grow any taller. She also had developed a kidney problem, which had already required surgery and might require more surgery, and she suffered from severe and chronic allergies. All of these problems left her feeling inadequate and insecure. Her depression made it difficult for her to concentrate on schoolwork, and her grades suffered. Her friendships were not stable. She latched on to a particular boyfriend with great intensity. The relationship did not work out, and its failure exacerbated her depression.

Alana's parents had trouble dealing with their daughter's troubled emotions because of the many feelings that their daughter's emotions generated in them.[4] Alana's mother had been a foster child during much

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3. Alana's story is presented in DAVID K. CURRAN, ADOLESCENT SUICIDAL BEHAVIOR 88-92 (1987).

4. A parent's resistance to acknowledging that her child is troubled is common. In one study of students in two high schools, when mental health professionals urged treatment for youngsters who were considered suicidal, half the parents refused the referral. Jane E. Brody, *Suicide Myths Cloud Efforts to Save Children*, N.Y. TIMES, June 16, 1992, at C1, C3.

This phenomenon is further illustrated by the retrospective analysis of one adolescent's suicide. Mike took an overdose of sleeping pills after hearing of the suicide of a casual acquaintance. His parents, both of whom were successful lawyers, refused to believe he was suicidal and were reluctant to hospitalize him for psychiatric care. One year later he killed himself. *Id.*

Another striking example of parental resistance can be found in a recent Florida case, Paddock v. Chacko, 522 So. 2d 410 (Fla. Dist. Ct. App. 1988). In *Paddock*, an adult female attempted suicide. After her suicide attempt she went to stay with her parents. A psychiatrist she consulted recommended that she be hospitalized. She agreed but suggested that he speak with her parents first.

The psychiatrist spoke with the patient's mother, who said the psychiatrist should talk with her father. He then spoke with her father, who believed that his daughter did not need hospitalization and that the family could handle the problem by itself. The father tried to help his daughter by rubbing alcohol on her legs and arms and talking with her

of her adolescence. Because of the loss of her own mother, Alana's adoptive mother had been the primary caretaker of her younger brothers and sisters and had to be tough, self-reliant, and independent in order to survive. She was a woman who had gone to extraordinary lengths to steel herself against ever feeling depression, unhappiness, or negative thoughts, and it angered her that Alana threatened to provoke these feelings in her. She appeared incapable of seeing in her daughter any of the feelings she herself had struggled to repress in her youth. Alana's father also kept himself distant from Alana. Although he had experienced depression and could empathize more with Alana's feelings, he had little involvement in her life. He spent most of his time away from home and slept a good deal of the time when he was at home.

During a very lonely summer, when most of her friends were away and she was feeling very estranged from, and misunderstood by, her parents, Alana took an overdose of valium. She took the pills in her bedroom when her parents were present in the house.[5] They heard her vomiting and rushed her to the hospital, where she stayed for two weeks.

Alana's suicide attempt only worsened her relationship with her parents.[6] Although her parents visited her regularly in the hospital, they found it very difficult to speak to her. They could not understand her behavior and could see no reason for her depression. Her mother re-

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to soothe her anxieties. The next day, before the father went to play golf, his daughter told him that she was upset and had been hallucinating. He left to play golf and the daughter went to a wooded area nearby and cut her wrists and set her blouse on fire.

5. It is common for an adolescent to attempt suicide at home when someone is present in the house. One study of 50 adolescent suicides found that 86% of the adolescents had someone present or nearby when committing the attempt, and 86% also notified a potential helper after the attempt. *See* CURRAN, *supra* note 3, at 43.

On the other hand, studies show that in a substantial number of the attempts made at home, parents are often not the first to be told. In one study, for example, 70% of the attempts were made at home with the parents in the house, but only 20% of the attempters reported the attempt to the parents first, if at all. Many called a friend, who was at some distance, while the parents sat in the next room.

These studies show that most suicidal adolescents do wish to be helped, but they also show the extent of the breakdown of communication in their families. *Id.* at 60. Another study showed that communication was so lacking between suicidal adolescents and their parents that more than half the mothers of the adolescents did not even know that their child had attempted suicide. Marcus Walker, M.D. et al., *Parents' Awareness of Children's Suicide Attempts*, 147 AM. J. PSYCHIATRY 1364 (1990).

6. Typically, parents and family members have great difficulty dealing with the adolescent's suicide attempt. The negative response of the parents and family members has an alienating effect on the attempter. This dynamic is portrayed in the 1980 film ORDINARY PEOPLE (Wildwood Enterprises 1980), in which a family struggles to reintegrate a teenage son into the home following his hospitalization for a suicide attempt. CURRAN, *supra* note 3, at 88. *See also* JERRY A. MOTTO, *Treatment Concerns in Preventing Youth Suicide*, *in* YOUTH SUICIDE, *supra* note 1, at 91, 97-98.

mained determined to hold on to her defenses, smiling throughout the entire session with Alana's therapist during which they discussed Alana's suicide attempt and the possibility of another one. Her father continued to remain concerned, but unavailable.

Alana's parents' failure to deal with her suicidal attempt simply exacerbated her feelings of alienation, and she tried suicide once again.[7] She wrote the following in a note before her second suicide attempt:

> I feel like a balloon with too much air in it. Everything has been bottled up inside of me for so long. All I ever wanted was a family. I guess I never got it. Everything I ever loved I've lost. . . . I love my daddy, but somehow along the way I lost him too. . . . This isn't to say that I don't love my mother. I really do. But somehow I don't think I ever had her. . . . I can't stand feeling worthless. . . . I'm sick of people asking me what's wrong without even caring about the answer. . . . I'm sick of trying to prove I'm okay to everyone else when I don't believe it myself. I'm tired of being lonely. I'm tired of being myself. . . . I'm sick of talking to people who don't hear me.[8]

Even after Alana's therapist showed her parents this note, they could not understand or respond to their daughter's feelings. Weeks later when Alana's mother was speaking to her therapist, she referred to Alana's suicidal attempt as that "thing" that occurred a while back. She could not even say the word suicide.

In addition to revealing her feelings of loneliness and inadequacy, Alana's note revealed her feelings that she was a burden to her parents. "I'm sick of pretending I'm happy so that I won't aggravate people anymore. . . . I never wanted to hurt anybody. I'm sorry for it and for being such a letdown to everybody."[9] Her feelings of being a burden to her parents had been present before the suicide attempts and were

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7. Persons who have already attempted suicide at least once are far more likely to attempt it again than people who have not attempted suicide. CURRAN, *supra* note 3, at 114. Some studies have shown that half of the children who make one attempt will make at least one other attempt and sometimes as many as two a year until eventually about 10% actually kill themselves. *See* Brody, *supra* note 4.

8. CURRAN, *supra* note 3, at 90-91.

9. Studies reveal that many suicidal adolescents feel they are a burden to their families and their families would be better off without them. In many cases the perception is covertly or overtly reinforced by the parents. CURRAN, *supra* note 3, at 30; *see also* CYNTHIA R. PFEFFER, THE SUICIDAL CHILD 146 (1986) (discussing the phenomenon of the "expendable child" as part of a complex set of family interactions contributing to the child's suicidal behavior).

reinforced after the first suicide attempt by relatives who were angry with her for frightening and upsetting her parents.[10]

In her work with her therapist, Alana eventually learned to accept her parents' limitations and to feel less alienated from them. As her anger and alienation from her parents lessened, she became a more enjoyable daughter for them. Because she was no longer threatening to her parents, they could feel more comfortable with and closer to her. Her work with them helped her healing process.

Like Alana, most suicidal adolescents have a significant psychological disturbance,[11] and that disturbance is generally rooted in deeply imbedded family pathology.[12] Their suicide attempt is generally not a wish to die but a cry for help.[13] Because the pain that causes adolescents to become suicidal is so intertwined with the adolescent's family dynamics, involvement of the family in the adolescent's treatment is almost always indicated.[14] In the best of circumstances, the family itself will change. As Alana's story demonstrates, however, even if that does not happen, at least the adolescent, with the help of a skilled therapist, can come to grips with the family's dynamics and heal.

Alana's parents became involved in her treatment because she attempted suicide in their home and they saw she was ill and took her

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10. Alana's story in some ways follows the common life sequence of suicidal adolescents charted by psychiatrists: "first, numerous behavior problems and dissensions within the family; second, onset of adolescence with yearning for autonomy and personal authority leading to strict discipline and personal restrictions on the child by the parents; third, alienation from the family with the development of an intense relationship with a single peer too intense to last; and finally, a suicide phase when all social and family attachments are gone." NORMAN L. FARBEROW, *Youth and Suicide: A Summary*, *in* YOUTH SUICIDE, *supra* note 1, at 191, 195.

Alana did not have behavior problems and open dissensions within her family, thereby not causing her parents to take steps to restrict her autonomy. However, she did feel increasing alienation from her family and tried to resolve her feelings of alienation by developing a consuming relationship with a boyfriend, which, because of the intensity she attached to it, did not last. As a result, she felt that all her social and family attachments were gone and she attempted suicide.

11. *See* Brody, *supra* note 4.

12. *See* NORMAN L. FARBEROW, *Youth Suicide: A Summary*, *in* YOUTH SUICIDE, *supra* note 1, at 191-200.

13. Studies on suicide have found that there are three major characteristics of suicide attempts: ambivalence, the temporary nature of the wish to die, and the attempt as a cry for help. *See* Bloch, *supra* note 2, at 938-39.

In addition, there is a good deal of research and clinical experience to support the view that most adolescent attempts, more so than the suicidal attempts of older persons, are not compelled by a strong wish to end one's life, but rather to ameliorate it. CURRAN, *supra* note 3, at 46-47.

14. Mental health professionals agree that it is critical to include the family in the treatment plan unless the families are far away or intractably estranged from the young person. MOTTO, *supra* note 6, at 91, 97-98.

to the hospital. Had Alana gone directly to a mental health professional and shared her suicidal impulses but asked that they not be disclosed to her parents, the mental health professional would have faced a serious conflict. The professional would have had to choose between maintaining Alana's confidence, thereby depriving Alana of the treatment benefits of parental involvement, or breaching the confidence and risking liability.[15]

The mental health professional's duty to maintain a patient's confidences is based upon two policies: protecting the patient's privacy and maximizing the benefits of the psychotherapist-patient relationship. These are strong interests that are not easily overcome. Nonetheless, courts and legislatures have recognized circumstances in which other considerations are still more compelling. This Article proposes that the need to involve a parent in a suicidal adolescent's treatment is such a compelling circumstance.

Part I examines the justifications for the patient's right to confidentiality and the circumstances in which legislatures and courts have deemed it appropriate to limit that right. The policies supporting a parental notification exception to the suicidal adolescent's right to confidentiality are then explored.

Part II explores the proper parameters of this exception and proposes that parental notification should be permitted[16] unless the mental health professional has reason to believe that parental notification would not be in the minor's best interest. In order to adequately protect the minor's right to confidentiality, Part II further proposes that, if a mental health professional wishes to contact a parent over an adolescent's objection, the professional should be required to obtain the concurrence of two other mental health professionals in this decision.

Part III examines the constitutional issues[17] presented by this proposal. Although there has been some recognition of a minor's consti-

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15. This concern has been discussed in the psychological literature. *See, e.g.*, Vernon Lee Sheeley and Barbara Herlihy, *Counseling Suicidal Teens: A Duty to Warn and Protect*, 37 THE SCH. COUNS. 89, 94 (1989).

16. The focus of the discussion will be on a rule permitting rather than requiring disclosure, because a permissive rule would be a less substantial change in the current law than a mandatory rule would be. It should be noted, however, that the policies supporting a permissive rule are equally appropriate to the adoption of a mandatory rule.

17. It should be noted that a permissive rule might not pose a constitutional question because it might not be deemed state action. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). If the provision were mandatory, however, it would constitute state action and would need to withstand constitutional scrutiny.

In addition, the constitutional analysis gives further insight into the appropriateness of such a rule because it provides the opportunity to test the value of the rule in the context of the law's most cherished principles.

tutional right to make her own treatment decisions, the role of a parent in her child's treatment decisions remains strong, and the right of a minor to make her own treatment decisions remains limited. Permitting a mental health professional to notify a parent if her child is potentially suicidal, therefore, is consistent with current constitutional law.

In addition, the right of a parent to make decisions regarding her child's health, although strong, is not absolute. To the contrary, it is limited by the state's *parens patriae* power to protect children. Therefore, limiting the rule to situations where notification would be in the minor's best interest should be constitutional.

I. The Rationale for a Parental Notification Exception to a Suicidal Adolescent's Right to Confidentiality

The legal role of the parent in making medical decisions for her child is changing. The general common law rule deems minors incapable of making medical treatment decisions and assigns that decisionmaking power to their parents. Thus, under the general common law rule the mental health professional owes the information about the minor's condition to the parents. Courts and legislatures, however, have created a variety of exceptions to this rule. The three traditional exceptions have emerged in emergency situations, when a minor is emancipated, and when a minor is mature enough to make the medical treatment decision on her own.[18]

In addition, legislatures have created other exceptions to the need for parental consent for treatment of minors in a variety of areas, including contraceptive services, prenatal care and delivery, sexually transmitted diseases and HIV, substance abuse, mental health care, and even general nonemergency medical care.[19]

There have also been some changes in the parent's right to commit a child to a mental hospital. Most states have statutes that empower parents to commit their children to psychiatric hospitalization.[20] Although

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18. For a discussion of the common law rule and exceptions, see Younts v. St. Francis Hosp. & Sch. of Nursing, Inc., 469 P.2d 330 (Kan. 1970).

19. Twenty-four states and the District of Columbia allow minors to give informed consent to contraceptive services. In 27 states, pregnant minors may consent to prenatal care and delivery. Every state except South Carolina allows minors to consent to diagnosis of sexually transmitted diseases. Eleven states specifically provide for a minor's right to consent to diagnosis for AIDS. Forty-six states allow minors to consent for drug and alcohol counseling. Twenty-eight states allow minors to consent to mental health treatment. *See* Cristine Russell, *How States Stand on Medical Care of Minors*, Wash. Post, April 7, 1992, at 13.

20. For an extensive discussion of these laws, see James W. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 Cal. L. Rev. 840 (1974).

generally considered under the rubric of "voluntary" commitments, these commitments are very different from voluntary commitments by adults, who can sign themselves in and out of a mental hospital at will. Once a child is committed, the child may not leave the hospital without the consent of the parent. More recently, however, some states have enacted statutes that allow children over a certain age to voluntarily commit themselves to psychiatric hospitalization.[21] Statutes that allow minors of a certain age to commit themselves also empower the minor to sign herself out if she wishes to do so.[22]

Minors, therefore, have become much more empowered to determine their own medical treatment and, thereby, have acquired the right of confidentiality that has traditionally flowed to the patient who consents to treatment. The following section analyzes the justifications for confidentiality and argues that there are compelling policy reasons to make an exception for parental notification when an adolescent is potentially suicidal.

A. Justifications for the Patient's Right to Confidentiality and Recognized Limitations on That Right

The rationales underlying the state statutory privileges and the common law duty not to disclose confidences reflect great respect for the patient's privacy and deep concern about the efficacy of the psychotherapeutic-patient relationship if the patient's confidences are not maintained.

Most states have statutory privileges covering physician-patient and psychotherapist-patient relationships. In addition, states have a variety of statutory privileges covering counseling relationships with a mental health professional other than a licensed psychiatrist or a licensed psychologist.[23] Although common law psychotherapist-patient privileges have been recognized in a few states and a constitutionally based psychotherapist-patient privilege has been recognized in some other states, state statutes are the primary source of the mental health professional-patient privilege.[24]

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21. *See, e.g.*, N.J. STAT. ANN. § 30:4-24 to -27.21 (West Supp. 1992), N.J. R. CT. 4:74-7(k) (a minor 14 years or older may request a voluntary commitment regardless of the wishes of the parents or guardian).

22. *See, e.g.*, *In re* Application of Williams, 356 A.2d 468 (Essex County Ct. 1976).

23. For a thorough discussion of these privileges, see Note, *Developments in the Law—Privileged Communications: IV Medical and Counseling Privileges*, 98 HARV. L. REV. 1450, 1530 (1985).

24. *Id.*

These privileges generally preclude forced disclosure by legal process of the communications between the mental health professional and patient. Exceptions exist: (1) when the patient introduces her mental condition as an element of a legal claim or defense, (2) when a psychiatric examination is ordered by the court and the patient is informed the communication will not be privileged, and (3) when a mental health professional in the course of diagnosis or treatment of the patient determines that commitment of the patient is appropriate.[25] Although the evidentiary privilege addresses only situations in which disclosure is sought in or through litigation, it reflects the broader professional rule of confidentiality.

As discussed below, there are three main rationales underlying these privileges. First, many believe that counseling relationships would suffer, indeed, that many people would not go into therapy at all, if people knew that their confidences might be disclosed in court. Second, the ability to control access to personal information about oneself is fundamental to our notions of privacy. Finally, professional ethics require that confidences be maintained.[26]

The notion that protecting confidences is necessary to a successful therapeutic relationship is basic to the establishment of a privilege. In *Allred v. State*,[27] for example, the court, in establishing a common law psychotherapist-patient privilege, discussed the four canons that evidence scholar John H. Wigmore suggested must be met in order to establish a privilege: (1) there must be confidences that should not be disclosed; (2) the element of confidentiality must be essential to a full and satisfactory relationship between the parties; (3) the relationship must be one which, in the opinion of the community, should be sedulously fostered; and (4) the injury that would befall to the relationship by disclosure of the communication must be greater than the benefit gained by correct disposal of the litigation.[28]

The court found that all four of these canons were met in the psychotherapist-patient relationship.[29] First, patients often make statements to psychotherapists that they would not make to their closest family members. They share the innermost recesses of their personality, the very portions of self which individuals seek to keep secret from the world at large. Revelations of these disclosures could have an irrevocably

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25. *See* Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving With One Hand and Removing With the Other*, 75 KY. L.J. 473, 505 (1986).
26. *See id.* at 477-79.
27. 554 P.2d 411 (Alaska 1976).
28. *Id.* at 417.
29. *Id.*

harmful effect on their reputations and well-being.[30] Second, without the promise of confidentiality the patient would not share her innermost feelings, such as guilt and shame, and the therapeutic efforts would be worthless.[31] In addition, the psychotherapeutic relationship is a relationship of great importance to society and, therefore, the benefits derived from preventing the disclosure of the communications outweigh society's interest in having those communications available for the correct resolution of litigation.[32]

The rationale that psychotherapy works best when confidences are protected is closely intertwined with the notion that a patient has a privacy interest in not having the statements of a very personal nature that he or she has made to a therapist disclosed to a third person. This rationale was discussed at length by the California Supreme Court in *In re Lifshutz*,[33] a case in which the constitutionality of the patient-litigant exception to the California psychotherapist-patient privilege was challenged. The court, in recognizing the patient's substantial privacy interest in keeping her disclosures to her therapist confidential, quoted the following from a District of Columbia Circuit Court decision: "The psychiatric patient confides more utterly than anyone else in the world. . . . [H]e lays bare his entire self, his dreams, his fantasies, his sins, and his shame."[34] Thus, although the California court held that the patient-litigation exception was constitutional, it interpreted the exception narrowly in order to provide maximum protection to the patient's privacy.

Finally, the original purpose for privileges was to protect a professional's honor by not requiring the professional to disclose a confidence he or she promised to keep secret.[35] Although that rationale has been abandoned as a stated basis for legal protection of confidences, some commentators believe it still is a significant factor behind the adoption of privileges.[36]

Unlike the psychotherapist-patient privilege, which has developed primarily through statutes, the duty of mental health professionals to maintain confidentiality apart from legal proceedings is a growing trend in American jurisprudence that has neither statutory nor historical com-

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30. *Id.*
31. *Id.*
32. *Id.* at 417-18.
33. 467 P.2d 557 (Cal. 1970).
34. 467 P.2d 557, 567 (quoting Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting MANFRED S. GUTTMACHER ET AL., PSYCHIATRY AND THE LAW 272 (1952))).
35. JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2290 (J. McNaughton ed. 1940 & Supp. 1991).
36. Smith, *supra* note 25, at 479.

mon law roots.[37] Instead, it is a fairly recent development based upon the belief that a person who goes to a physician reasonably expects that the information the person shares with the physician will be kept confidential. The duty to maintain confidences has never been considered absolute; to the contrary, from its inception, courts have recognized an exception to this rule for instances where the disclosure of information is necessary to protect the health and safety of the public.[38] Nonetheless, it is now deeply entrenched in American case law, with most jurisdictions recognizing that such a duty exists.[39]

Although the duty not to disclose first developed in the context of the patient-physician relationship, it quickly was extended to the psychotherapist-patient relationship.[40] In establishing liability for disclosure, courts noted that there is often a stigma associated with undergoing psychotherapy and if therapists were free to reveal that a person was undergoing psychotherapy, the patient might suffer embarrassment and even economic loss.[41]

In addition, courts recognized that, as discussed above, psychotherapy is most effective when patients feel free to reveal their most private thoughts and emotions to the therapist. Because much of what they reveal might be humiliating or embarrassing to the patient if it were shared with another, courts reasoned that patients must feel free to disclose private information to their therapists without fear that it will be disclosed to others.[42]

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37. *See* Marjorie B. Lewis, Note, *Duty to Warn Versus Duty to Maintain Confidentiality: Conflicting Demands on Mental Health Professionals*, 20 SUFFOLK U. L. REV. 579, 606 (1985).

38. *See* Simonsen v. Swenson, 177 N.W. 831, 832 (Neb. 1920) (recognizing that a wrongful breach of confidence gives rise to a cause of action for damages, but holding that a physician is privileged to disclose confidential information if the disclosure is necessary to prevent the spread of a contagious disease).

39. *See* Lewis, *supra* note 37, at 603.

40. Some courts have viewed the patient's right to privacy in the psychotherapist-patient relationship as so fundamental that they have found it constitutionally based. In *In re* B, 394 A.2d 419 (Pa. 1978), for example, the Pennsylvania Supreme Court recognized a patient's constitutionally based right not to have disclosed any information pertaining to her relationship with her psychotherapist. *Id.* at 425. *In re B* involved a juvenile delinquency proceeding concerning "B." During the course of the predisposition investigation, juvenile court personnel discovered that B's mother had received psychiatric treatment. The court held that the statutory doctor-patient privilege did not apply to the disputed records, but that the constitutional right of privacy protected the information from involuntary disclosure. *Id.* at 423-25. The court noted that although the state had a significant interest in obtaining the information, psychotherapy requires patients to reveal very intimate details of their lives and the patient's privacy in these communications must be protected. *Id.* at 425-26.

41. *See* Lewis, *supra* note 37, at 592.

42. *See, e.g.*, MacDonald v. Clinger, 446 N.Y.S.2d 801, 805 (N.Y. App. Div.

These traditional concerns were eloquently set out by Justice Clark in his dissent in *Tarasoff v. Regents of the University of California,*[43] a landmark case establishing a therapist's duty to breach a patient's confidence if the therapist has reason to believe a third party is in danger. In his dissent, Justice Clark argued that the majority did not give adequate consideration to the traditional policies underlying the duty not to disclose confidences and stressed the negative practical effect disclosure would have on the psychotherapeutic relationship.[44]

According to Justice Clark, confidentiality is essential to the therapeutic relationship for three reasons. First, without the assurance of confidentiality, those requiring treatment will be deterred from seeking assistance. The apprehension of the stigma associated with treatment, increased by the fact that many seeking treatment have low opinions of themselves, contributes to a well-recognized reluctance to seek aid. This reluctance would be significantly increased if there were disclosure of information conveyed during treatment.[45]

Second, even if a person were to seek treatment, confidentiality would be necessary for effective treatment. Patients have conscious and unconscious inhibitions against revealing their innermost thoughts and resistance would be magnified if there is a possibility of disclosure of such confidential information.[46]

Finally, even if there is full disclosure from patient to therapist, the assurance that the confidential relationship will not be breached is necessary to the maintenance of trust in the psychotherapeutic relationship. Justice Clark explained that the essence of psychotherapy is the development of trust in the external world and ultimately in the self.[47] This trust develops through modeling based upon the trusting relationship established during therapy. Treatment will be frustrated if there is collusion between the therapist and others.[48]

As indicated above, the duty not to disclose confidences, even in the psychotherapeutic relationship, is not absolute. To the contrary, some jurisdictions require mental health professionals to breach a patient's confidentiality to protect a third person.[49] This duty to warn, however,

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1982) (holding that except where necessary to protect a threatened interest, a therapist has a duty of nondisclosure because the relationship between psychiatrist and patient is one of trust and confidence).

43. 551 P.2d 334 (Cal. 1976).

44. *Id.* at 354-62 (Clark, J., dissenting).

45. *Id.* at 359.

46. *Id.*

47. *Id.* (quoting Donald J. Dawidoff, *The Malpractice of Psychiatrists*, 1966 DUKE L.J. 696, 704).

48. *Id.* at 359-60.

49. In *Tarasoff*, Prosenjit Podder, a voluntary out-patient at the Cowell Memorial

has not been extended to suicidal patients. In *Bellah v. Greenson*,[50] for example, a California court held that the *Tarasoff* doctrine did not require a therapist to warn parents of a suicidal patient of the patient's suicidal inclination. According to the court in *Bellah*, *Tarasoff* did not require therapists to warn others of the likelihood of any and all harm.[51] The court in *Bellah* expressed concern that the therapeutic relationship would be compromised if therapists revealed that their patients manifested suicidal tendencies.[52] It further reasoned that, unlike the third party situation, the need for confidentiality is not outweighed by the risk of suicide because the imposition of such a duty could well inhibit psychiatric treatment.[53]

The decision that has come closest to establishing a duty to notify a parent that her child is potentially suicidal is the recent Maryland case of *Eisel v. Board of Education*.[54] In *Eisel*, the father of a thirteen-year-old child who was killed as part of a suicide-murder pact with another adolescent sued two guidance counselors for failing to disclose to him information the counselor received that the daughter had told friends she intended to kill herself. The theory of the father's lawsuit against the counselors was that had he been informed of his child's suicidal intentions he could have exercised his custody and control over her and prevented her death.[55] The guidance counselors, on the other hand, claimed that had they disclosed this information, children would be less inclined to come to them with their problems in the future.[56]

Hospital at the University of California at Berkeley, confided his intention to kill Tatania Tarasoff to Dr. Lawrence Moore, the treating psychologist. Dr. Moore contacted the campus police and requested that Podder be detained. The police apprehended Podder but released him because he appeared rational and promised to stay away from Ms. Tarasoff. Dr. Moore's supervisor directed that no further action be taken to detain Podder. Neither Ms. Tarasoff nor her family were warned of the threat. Two months later Podder went to Ms. Tarsoff's home and killed her.

The California Supreme Court held that when a therapist determines, or by the standards of her profession should determine, that her patient presents a serious danger of violence to another, the therapist incurs the obligation to use reasonable care to protect the intended victim against such danger. *Id.* at 343. The discharge of the therapist's duty will vary according to the circumstances, but may include warning the intended victim or others of the danger or notifying the police. *Id.* at 345-46. In reaching its decision, the court considered the argument that psychologists cannot predict dangerousness and responded that these considerations were met by the standard of due care. *Id.* at 344-45.

See also McIntosh v. Milano, 403 A.2d 500, 512 (N.Y. Sup. Ct. 1979); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980).

50. 141 Cal. Rptr. 92 (Cal. Ct. App. 1977), *aff'd*, 146 Cal. Rptr. 535 (1978).
51. *Id.* at 94-95.
52. *Id.*
53. *Id.* at 95.
54. 597 A.2d 447 (Md. 1991).
55. *Id.* at 448.
56. *Id.* at 455.

The court discussed the strong public policy against adolescent suicide and ruled that the counselors had a duty to take reasonable measures to prevent the child's suicide and that those measures might have included notifying her father.[57] In determining that the counselors had a duty, the court found that the risk of harm to a child who threatens suicide is so great and the burden on the counselors to take some kind of preventive action so minimal that "the scales tip overwhelmingly in favor of duty."[58]

Although *Eisel* did not deal with a breach of confidentiality because the information the counselors received was from students who did not have a confidential relationship with the counselors, the court's analysis is relevant to a discussion of the appropriateness of allowing mental health professionals to breach confidentiality in order to protect suicidal adolescents. We are, indeed, dealing with a tremendous risk of harm not only to the suicidal adolescent but to the suicidal adolescent's family and to other adolescents who might be affected by a suicide by one of their peers. Therefore, an aggressive stance in fighting this epidemic seems appropriate.

B. Policies That Support a Parental Notification Exception for Suicidal Adolescents

As discussed above, if there are compelling reasons to do so, legislatures and courts will limit the scope of a patient's confidentiality. Allowing disclosure of an adolescent's suicidal impulses to her parents over the adolescent's objection would recognize the profound role that parents play in the lives of suicidal adolescents. It would give parents the opportunity to help children in the following ways:

First, as indicated in the Introduction to this Article, most suicidal adolescents are mentally ill and their illness is linked to family pathology. In order for the treatment of the child to be most effective, the parents should be involved in the treatment, even if their involvement is forced upon the child, so that the therapist better understands the family dynamics.

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57. *Id.* at 456. The case was remanded for trial on whether reasonable measures were taken.

58. *Id.* at 455. Interestingly, the *Eisel* court based its decision on general negligence analysis and not on a special relationship between the counselor and the student. Traditionally, such a duty would arise only if there were a special relationship that created such a duty. See Margot O. Knuth, Comment, *Civil Liability for Causing or Failing to Prevent Suicide*, 12 LOY. L.A. L. REV. 967, 987-95 (1979), for a discussion of cases that held there was a legal duty of care to prevent a foreseeable suicide when there was a special relationship such as between hospital and patient.

Second, the involvement of the suicidal adolescent's parents in her treatment is critical to the preservation of the family unit. It is imperative that parents are involved in this process in a way that encourages family unity and confidence. As one commentator pointed out, children will be harmed if parents are made to believe that only professionals know what is best for their child.[59] Allowing parents to have input into the child's mode of treatment may help the child and reduce the stress that having a potentially suicidal adolescent places on a family.

Third, providing notice to the parents gives them an opportunity to take steps consistent with the values with which they have raised their child. Professionals do not know the child's background as well as her parents. For example, if a child has been raised in a particular religious tradition and the parents know of a counseling agency associated with her faith that might be beneficial to their child, giving the parents the opportunity to arrange such treatment might be beneficial to the parents and child.

Fourth, notifying the parents will give them the opportunity to seek out the best services for their child. Most adolescents are not as experienced as their parents in making choices regarding medical treatment. In addition, parents will, in reality, bear the cost of the child's treatment. Allowing parents to participate in the decision will help them choose a mode of treatment which will be best for the child and which the parents can afford.

Fifth, it is critical that home environments be as safe as possible for children at risk. Not all children who are potentially suicidal should be hospitalized. It is very difficult to determine whether a child is suicidal and what environment will be most helpful to that child's healing. If a child is living at home, it is critical that that environment be made as safe as possible for the child. For example, having guns in the home is a major facilitator of adolescent suicide.[60] A parent who is ignorant of a child's mental state might keep a gun in the house that the parent would remove if she knew her child was at risk.

Sixth, notification to the parents would give them an opportunity to observe their child and to take measures to prevent the potential suicide.

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59. *See* Michael Wald, *State Intervention on Behalf Of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

60. There is little doubt that ready availability of firearms makes violent acts, such as suicide, easier to commit. The fact that an individual can be temporarily deterred from committing a suicidal act enhances the chances for survival. This is particularly true for young persons because their emotions are changeable and their personalities are in a state of development toward maturity. Firearms and explosives account for the largest number of suicides by a significant margin, 57% of total deaths and 64% of deaths among males and over 38% of deaths among females. *See* CALVIN J. FREDERICK, *An Introduction and Overview of Youth Suicide*, *in* YOUTH SUICIDE, *supra* note 1, at 1, 8.

For example, substance abuse has been found to be not only significantly associated with adolescent suicide, but a serious symptom contributing to increased suicidal risks and more medically serious attempts. Substance abuse is often both a contributor to the suicidal process and the means for the suicidal act.[61] Thus, alerting the parents to a potentially suicidal child would allow them the opportunity to observe whether their child is abusing drugs and to take steps to help the child prior to a serious suicide attempt.

Seventh, the medical services currently available to minors do not provide them with the kind of warmth and personal attention that parents generally provide their children. For example, Justice Stewart noted in his concurrence in *Planned Parenthood v. Danforth*[62] that abortion clinics provide little individual attention and emotional support to minors getting abortions.[63] Although there is no indication that minors who go for abortions are emotionally ill and in need of special support, children who are suicidal are mentally ill and do need special support. Their deep ties with their parents, even those parents who may be resistant to, or threatened by, their child's suicidal impulses, indicate that most suicidal teenagers will benefit from having their parents involved in their treatment.

Finally, mental health professionals who deal with potentially suicidal adolescents are most effective when they have the support of others, including the parents. Numerous studies indicate the difficulty in predicting whether a person is suicidal.[64] The strain that mental health professionals experience when dealing with suicidal patients is also well documented.[65] Having the support of the parent of a suicidal adolescent can be helpful in reducing a therapist's stress and in making the treatment more beneficial.[66]

Yet, there are four potential problems with allowing therapists to notify a parent that her child is potentially suicidal over the child's objection: (1) the possibility that suicidal adolescents might be deterred

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61. Almost half of the young people who commit suicide are high on alcohol or other drugs shortly before their death. *See* STEPHEN A. FLANDERS, SUICIDE 31 (1991). *See also* CURRAN, *supra* note 3, at 32.

62. 428 U.S. 52 (1976).

63. *Id.* at 91.

64. *See, e.g.*, Joseph J. Cocozza and Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976).

65. *See* CURRAN, *supra* note 3, at 146.

66. Clear and open communication with pertinent family members . . . broadens the base of responsibility. . . . In the event of a suicide, the therapist is able to provide support for the family . . . as well as share the loss with them as a fellow survivor. Family members can be remarkably supportive and appreciative of the therapist's efforts. MOTTO, *supra* note 6, at 106.

from seeking help; (2) the possibility that, even if adolescents seek help, they might not feel free to disclose their feelings, thus undermining the effectiveness of the therapy; (3) the inherent and offensive violation of the adolescent's privacy; and (4) the practical difficulties in applying the rule.

Because many suicidal adolescents have troubled family relationships, they might not want their parents to know they are seeking help. As discussed in Part II, however, the proposed rule would allow parental notification over a suicidal adolescent's objection only when the mental health professional, along with two other mental health professionals, determines that it is in the adolescent's best interest. Such a limitation should alleviate the concern that suicidal adolescents would be deterred from seeking help out of fear that their parents would be notified of their suicidal impulses.

Moreover, the traditional notions underlying the value of confidentiality for the adult psychotherapist-patient relationship may not be as appropriate to the adolescent psychotherapist-patient relationship. Even more than with adults, most adolescents who attempt suicide do not wish to die, but, instead are expressing their need for help to deal with their pain.[67] If notifying the parents helps the adolescent feel better, it is doubtful that permitting a therapist to contact the adolescent's parents would deter other adolescents from seeking such aid.[68]

In addition, the general gain to society derived from involving a parent in the treatment of the suicidal adolescent should outweigh any minimal deterrence resulting from such a policy. Mental health professionals agree that effective treatment of suicidal adolescents under most circumstances requires family participation in the adolescent's treatment.[69] Therefore, any slight deterrent effect from permitting a mental health professional to notify an adolescent patient's parents that the child is suicidal would be outweighed by the benefit of having more families participate in the treatment of their suicidal adolescent children.

One might also argue that even if a suicidal adolescent goes for help, knowledge that the parents could be notified of the adolescent's suicidal feelings would undercut the effectiveness of the therapy because the adolescent would not feel free to disclose suicidal feelings. Again, the fact

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67. *See supra* note 13.

68. Indeed, the opposite may well be true. As discussed earlier, in *Eisel*, for example, where friends told the guidance counselor a child was involved in a suicide-murder pact, the child denied it and her parent was not notified. The child went through with the plan and was murdered. The guidance counselor's lack of action in trying to protect the child might well have deterred others from going for help and had the child been saved, more, not fewer adolescents, might have sought help.

69. *See supra* note 13.

that parental notification would not be permitted in those circumstances where it would be harmful to the adolescent should alleviate this concern. Those adolescents for whom notification would be beneficial will most likely not be as threatened by parental notification and might actually welcome the opportunity for improved communication with their parents.

Of more concern is the offensiveness of requiring a violation of the adolescent's privacy. A child who is suicidal is suffering greatly and is often ashamed of his or her inability to cope and of the suicidal feelings. To strip the child of the right to a private therapeutic relationship and to subject the child to possible humiliation by parents who may not be sympathetic to those suicidal feelings may be counterproductive and violate fundamental notions of privacy.

As will be discussed in Part III, however, the state has wide latitude in taking action to protect children. Most suicidal adolescents are acting out of great pain and not out of the desire to die.[70] Therefore, it does not appear appropriate to allow general notions of privacy to prevent society from taking measures that might help to save the lives of suicidal adolescents, particularly when the breach of the adolescents' privacy is only to their parents, not to others, such as teachers or peers.

Finally, although it is hard to determine when a teenager is potentially suicidal, and a rule permitting parental notification might encourage a mental health professional to err on the side of notifying a parent even when a child is not suicidal, over-notification should not be a problem.[71] If an adolescent does not demonstrate any of the signs of being potentially suicidal, parental notification would be inappropriate. If the adolescent demonstrates sufficient signs of being potentially suicidal to raise serious questions in the therapist's mind, parental notification would be appropriate. To the extent that a therapist errs on the side of parental involvement when the therapist determines that it would be in the adolescent's best interest, for all the reasons discussed above, there is no cause for alarm. To the contrary, more parental involvement with seriously disturbed teenagers would be beneficial to them and might, indeed, forestall a future potential suicide.

In summary, allowing a breach of confidentiality for any purpose has serious implications and must be done only for an extraordinary reason. The prevention of adolescent suicide is such an extraordinary reason. Suicidal adolescents are crying out for help. Often, their parents, troubled

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70. *See supra* note 13.

71. A similar concern was raised in *Tarasoff*, in that, because it is hard to predict dangerousness to third persons, therapists might overpredict dangerousness to protect themselves. The California Supreme Court responded that that concern should be met by the fact that therapists will continue to be bound by the general standard of care in their profession. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976).

as they may be, as in Alana's story, are a source of help to the therapist. A rule permitting a mental health professional to notify the parents that their child is suicidal, over the child's objection, might save lives. This appears to be sufficient justification to limit an adolescent patient's right to confidentiality in this circumstance.

II. The Implementation of a Parental Notification Exception for Suicidal Adolescents

The development of a legal rule permitting a mental health professional to breach a suicidal adolescent's right to confidentiality raises the following questions: (1) To which suicidal adolescents should the rule apply? (2) Which mental health professionals should be affected by the rule? (3) What standard should the rule provide?

First, the rule should apply to all suicidal minors who are empowered to consent to their own mental health treatment. Because the right of minors to consent to treatment varies greatly among states, each state adopting this rule would need to define the class of minors to whom it would apply.

Second, the rule should apply to all mental health professionals currently bound by rules of confidentiality.[72] Again, this group would vary greatly from state to state.

Third, the rule should provide that a mental health professional is permitted to notify a parent of an adolescent's suicidal impulses over the objection of the adolescent if the mental health professional has reason to believe that the child would benefit more from having the parent notified than from not having the parent notified.

Finally, in order to adequately protect the adolescent's interest in maintaining confidentiality, the rule should require that the treating mental health professional could notify the adolescent's parent over the adolescent's objection only if two other mental health professionals concur in this decision.

This provision would have several benefits. First, it would relieve the therapist of the stress of having total responsibility for the decision.[73] Although it would be a slight burden on the treating therapist, obtaining

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72. Although there are unlicensed mental health professionals for whom this rationale would logically apply, unlicensed mental health professionals raise a variety of issues that are beyond the scope of this article.

73. One study indicated that losing a patient to suicide had such a profound personal effect on therapists that almost half of the therapists surveyed who had lost a patient reported symptoms of stress in the weeks following the suicide comparable to that of an individual who had lost a family member. *See* Bruce Bongar and Mort Harmatz, *Graduate Training in Clinical Psychology and the Study of Suicide*, 20 Prof. Psychol. Res. & Prac. 209, 211 (1989).

concurring opinions is consistent with the current practice of mental health professionals.[74] Second, this provision is preferable to providing for a judicial determination. It is not appropriate for judges, untrained in the dynamics of suicide, to make determinations about the treatment of suicidal minors.[75] Trained mental health professionals, experienced with the complex dynamics between suicidal adolescents and their parents, are most qualified to assess whether parental notification would be beneficial to the suicidal child.

In addition, having more than one therapist make this determination might ultimately help the relationship between the adolescent and her therapist, because the treating therapist would not be the only person responsible for going against the adolescent's wishes. Although there is a risk that the adolescent will feel mental health professionals are conspiring against him or her, and thus increase the adolescent's feelings of desperation and isolation, a caring therapist should be able to present the decision to involve the adolescent's parents in a way that will not antagonize the adolescent.

In summary, whether the rule is developed through the common law or by statute, each jurisdiction would have to tailor the rule to make it consistent with the jurisdiction's definition of the minor's capacity to consent to medical treatment, the jurisdiction's definition of confidentiality, and the jurisdiction's classification of persons to whom confidentiality applies. Nonetheless, because most jurisdictions do recognize a cause of action for a breach of confidentiality and the trend is to expand the right of minors to consent to treatment, it is a rule that would provide much needed clarification to mental health professionals in most jurisdictions.

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74. Consultation is the customary practice among mental health professionals when dealing with difficult issues pertaining to suicidal patients. Telephone interview with Dr. Jed Lehrich (Aug. 5, 1992), a family therapist who treats suicidal adolescents on a regular basis.

75. The Supreme Court has recognized the appropriateness of having mental health professionals make determinations based on their particular expertise. In Youngberg v. Romeo, 457 U.S. 307 (1982), for example, the Court noted that judges and juries are not equipped to make the kinds of decisions that mental health professionals are equipped to make. *Id.* at 322-23.

Romeo dealt with the issue of whether due process requires a mentally retarded person, involuntarily confined by the state, be provided with safe conditions of confinement, freedom from bodily restraint, and training or habilitation. The Court established that Romeo retained a liberty interest in safety and freedom from bodily restraint which required habilitation. In determining what training was reasonable, the Court emphasized that courts must show deference to the judgment exercised by a qualified professional. *Id.* Indeed, Justice Powell stated that a decision made by a professional is presumptively valid and the professional can only be liable when the decision by the professional is a substantial departure from accepted professional judgment. *Id.* at 323.

III. The Constitutionality of a Parental Notification Exception for Suicidal Adolescents

As adolescents become increasingly empowered to determine the course of their treatment, it would appear that the choice of whether to involve the parents in treatment would be the minor's choice. An examination of the current state of constitutional law reveals, however, that a government-imposed rule allowing parental notification over a suicidal minor's objection would pass constitutional muster if notification would not be allowed when it would be harmful to the child.[76] Parents have a strong liberty interest in making decisions regarding the upbringing of their children. In addition, the United States Supreme Court has permitted substantial infringements of the two constitutionally recognized rights of minors to determine their own treatment.[77] Finally, any developing constitutional rights of minors to determine their own treatment would be outweighed by the state's strong interest in protecting minors and preventing adolescent suicide. Thus, the only constitutional constraint on parental notification would be the state's *parens patriae* interest in protecting children from harm.

A. The Constitutionally Grounded Parental Interest in Making Decisions Regarding a Child's Upbringing

The Supreme Court first recognized a right of parental autonomy over the family in *Meyer v. Nebraska*.[78] In *Meyer*, a state court convicted a teacher who taught German to a ten-year-old child in violation of a state statute forbidding the instruction of modern languages to children below the ninth grade. The Supreme Court found that the statute violated the parents' liberty under the due process clause.[79] In defining liberty, the Court emphasized that liberty included not only the right to be free from bodily restraint, but also embraced those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men, including the right of parents to establish a home and bring up their children.[80] According to the Court, education and the acquisition of knowledge were matters of supreme importance and the statute unjustifiably violated a parent's right to control her child's education.[81]

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76. *See supra* note 17.

77. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Parham v. J.R., 442 U.S. 584 (1979).

78. 262 U.S. 390 (1923).

79. *Id.* at 403.

80. *Id.* at 399.

81. *Id.* at 400-03.

A parent's right to direct his or her child's education was again recognized a few years later in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*,[82] in which the Court enjoined enforcement of a statute requiring parents to send children between the ages of eight and sixteen to a public school. In holding that the statute unreasonably infringed upon a parent's liberty interest, the Court stated: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[83]

Years later, in *Wisconsin v. Yoder*,[84] the Supreme Court once more acknowledged the importance of the parents' right to direct the upbringing and education of their child. In *Yoder*, the Court upheld a challenge by Amish citizens to a compulsory education statute as violative of the Free Exercise Clause of the First Amendment. In so doing, the Court emphasized its holding in *Pierce* that the right of parents to direct their child's upbringing and education during the child's formative years has a "high place in our society"[85] and held that Wisconsin could not require members of the Amish Church to send their children to public school after the eighth grade.[86] The Court noted the adequacy of Amish education methods, the sincerity of Amish religious beliefs, and the interrelationship between Amish beliefs and the preservation of the Amish way of life.[87] It concluded that the state's interest in requiring one or two more years of education for Amish children was outweighed by the right of the parents to raise their children according to Amish customs.[88]

A rule allowing parents to be notified that their child is suicidal is consistent with the parents' liberty interest in caring for their child. As the Court indicated in *Parham v. J.R.*,[89] discussed below, the parents' liberty interest in caring for their child includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice.[90] To care for a child's emotional well-being is certainly a "[privilege] long recognized at common law as essential to the orderly pursuit of happiness by free men."[91] Thus, the parental liberty interest is a strong constitutional basis for a parental notification rule.

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82. 268 U.S. 510 (1925).
83. *Id.* at 535.
84. 406 U.S. 205 (1972).
85. *Id.* at 214.
86. *Id.*
87. *Id.* at 216-17.
88. *Id.* at 218.
89. 442 U.S. 584 (1979).
90. *Id.* at 602.
91. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

B. The Power of the State to Substantially Infringe upon a Minor's Physical Liberty Interest and Reproductive Rights

Traditionally, the only protection that children had against absolute control by their parents was the state's exercise of its *parens patriae* power. In recent years, however, as discussed below, the United States Supreme Court has recognized that children do have some independent rights, including the right not to be unnecessarily confined and the right of a female to make choices regarding whether to bear a child. The Court has not treated these rights as fundamental rights but, rather, as significant rights that can be substantially curtailed because of the youth and inexperience of minors.[92] Presuming that a parent will act in the best interest of her child, the Court has allowed state curtailments of these rights that have required significant parental involvement in a child's treatment.

In *Parham v. J.R.*, the Court recognized that minors have a substantial liberty interest in not being confined unnecessarily for medical treatment. However, it rejected a claim that Georgia's psychiatric commitment statute was unconstitutional because it provided for parental commitment of a child without a formal hearing and based simply upon an independent psychiatrist's concurrence. The Court stressed the importance of the parents' role in determining their child's medical treatment. The Court agreed that the nature of the commitment decision is such that parents cannot have absolute and unreviewable discretion to decide whether to institutionalize a child. Nonetheless, it ruled that absent a finding of abuse or neglect, the parent should retain a substantial, if not the dominant, role in the commitment decision.[93] In allowing parents this power, the Court reasoned that the law's concept of family rests on the presumption that parents possess what a child lacks in the maturity, experience, and capacity for judgment that are required for making life's difficult decisions.[94] In addition, the Court noted that natural bonds of affection generally lead parents to act in the best interests of their children.[95]

The great latitude that *Parham* gives to states to infringe upon a minor's physical liberty interest, by providing parents with a substantial role in the decision as to whether to commit a child, indicates that a rule allowing parental notification when an adolescent is suicidal would be constitutional. The children in *Parham* were emotionally ill, not suicidal; yet the Court allowed the state to substantially infringe upon their right of physical liberty because the Court presumed that a parent would not seek to commit a child unless it was in the child's best interest. Similarly,

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92. *See infra* text accompanying note 98.
93. 442 U.S. at 604.
94. *Id.* at 602.
95. *Id.*

a court would most likely presume that, if a parent were notified that his or her child was suicidal, the parent would take steps to help the child. A court would, therefore, allow this infringement on the minor's right to determine his or her own treatment.

As with a minor's right to physical liberty, the Court, although recognizing a female minor's right to determine whether or not to bear a child, has allowed substantial restrictions on that right.[96] Again, the Court has allowed these restrictions based upon its concern about minors' lack of experience, lack of ability to make a healthy decision for themselves, and the presumption that parents will act in their child's best interest.

There is no question that a minor's privacy interest encompasses a decision as to whether or not to bear children.[97] Nor is there a question as to the constitutionality of a provision requiring parental consent, as long as there is an alternative procedure provided to the minor to avoid the need for parental consent in appropriate cases.[98] The more recent questions with which the Court has struggled have pertained to the nature of the alternative procedure that must be provided.

In *Bellotti v. Baird*,[99] a plurality made clear that a minor's liberty interest is not violated by a statute requiring parental notification if the statute has a "bypass" procedure that allows the minor to establish that she is mature enough to make her own decision regarding whether to have an abortion.[100] The Court struck down a Massachusetts statute that required parental consent for any unwed female under the age of eighteen to obtain an abortion. In striking down this statute, the Court emphasized three distinct reasons for justifying an infringement of a minor's rights: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[101] The Court also noted, however, the distinct nature of the abortion decision and ruled that a state that requires parental notice or consent for minors to obtain abortions must provide an opportunity for minors to go directly to court without first consulting or notifying their parents and, if the minor establishes that she is mature enough to make her own decision, the parental consent requirement must be waived.[102]

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96. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990); Bellotti v. Baird, 443 U.S. 622 (1979).

97. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976).

98. *Id.*

99. 443 U.S. 622 (1979).

100. *Id.* at 643-44.

101. *Id.* at 634.

102. *Id.* at 643-44. The statute in *Bellotti* provided that if one of the minor's parents

The degree of complexity that the Court has allowed in "bypass" procedures indicates once more, however, the court's willingness to allow states to infringe upon a minor's liberty interest. In *Ohio v. Akron Center for Reproductive Health*,[103] the Supreme Court held that a statute, which the appellants argued created substantial impediments to the minor's right to a bypass procedure, was constitutional.[104] The court of appeals had held the statute was unconstitutional because the "bypass" procedure was inadequate.[105] The majority of the Supreme Court disagreed. The Court rejected, for example, the appellee's constitutional challenge to placing the burden on the minor of proving by clear and convincing evidence that she was mature enough to make her own determination regarding the abortion, or that it was in her best interest to have the abortion. The Court reasoned that it was appropriate to require a heightened standard of proof because the bypass procedure was an *ex parte* proceeding at which no one opposed the minor's testimony.

In the most recent Supreme Court decision, *Planned Parenthood v. Casey*,[106] the Court again made clear the limited nature of a minor's liberty interest by upholding a parental consent provision with a judicial "bypass" within a general law that provided for informed consent. The statute at issue provided that, except in a medical emergency, at least twenty-four hours before performing an abortion, a physician must inform the woman of: (1) the nature of the procedure; (2) the health risks of

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refused consent, the abortion could be obtained by order of a judge "for good cause shown." *Id.* at 644. The Massachusetts Supreme Court, however, had interpreted the statute to mean that the minor must first seek the consent of her parents and, only if one of her parents refused consent, could she then go to a court for permission to have the abortion. *Id.* at 646.

103. 110 S. Ct. 2972 (1990).

104. *Id.* at 2983. The "bypass" procedure required the minor to file a complaint in the juvenile court, stating that she had sufficient maturity and information to make an intelligent decision whether to have an abortion or that one of her parents had engaged in a pattern of physical, sexual, or emotional abuse, or that notice was not in her best interests. The minor was also required to state that she was pregnant, unmarried, under eighteen and emancipated, desired to have an abortion without notifying one of her parents, and whether she had retained an attorney.

In order to file a complaint, a minor had to select one of three forms: one alleging that she was mature enough to make her own decision, another alleging that the abortion was in her best interest, and the third form alleging that she was mature enough to make her own decision and that it was in her best interest. The minor was required to sign the form and to provide the name of her parents on the form. Whether the minor alleged that she was mature enough to make the decision on her own or that an abortion was in her best interest, she had to prove her allegations by clear and convincing evidence. A closed hearing was to be held so that the anonymity of the complainant was preserved and all papers were to be kept confidential.

105. *Id.* at 2978.

106. 112 S. Ct. 2791 (1992).

abortion and of childbirth; (3) the probable gestational age of the unborn child; and (4) the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies that provide adoption and other services as alternatives to abortion.[107] In addition, the law provided that an abortion could not be performed unless the woman certified in writing that she had been informed of the availability of these printed materials and had been provided with a copy if she wished to see them. The parental consent provision required that one parent of a pregnant minor also receive such information and that both one parent and the minor give informed consent to the procedure.

In upholding the parental consent provision of this statute, the plurality opinion held that the only difference between this and previously upheld parental consent provisions was that it required that parental consent be informed in a very specific sense.[108] The Court held that the same reasons justifying the imposition of informed consent generally were applicable to minors.[109] Indeed, according to the Court, they applied even more so because the waiting period, for example, might provide the parents of a young woman with the opportunity to consult with her in private and to discuss the consequences of her decision in the context of the values and moral or religious principles of her family.[110]

These abortion cases make clear that the state can impose substantial restrictions on a minor's exercise of her right to determine her medical treatment. Although many of the restrictions imposed on minors desiring abortions have to do with protection for the fetus, the reasoning upholding restrictions in the abortion cases rely primarily upon the minor's inexperience and lack of judgment in making such critical decisions. Abortion is obviously less irrevocable than suicide because the adolescent who chooses to abort will go on with her life and typically will still be able to bear children in the future. It appears, therefore, that greater restrictions on the right of a suicidal minor to determine her treatment would be tolerated and that a parental notification provision for suicidal adolescents with a "bypass" procedure would be constitutional.

C. The Power of the State to Regulate a Minor's Developing Right to Determine His or Her Own Medical Treatment

Although the Supreme Court has explicitly recognized the constitutional rights of minors to determine their treatment only in the areas

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107. *Id.* at 2823.
108. *Id.*
109. *Id.* at 2832.
110. *Id.*

of physical liberty and reproductive rights,[111] many states have recognized by statute the rights of minors to determine their treatment in other areas.[112] Assuming that the Court were to find that these rights are constitutionally based, an analysis of the existing right-to-determine-treatment cases makes clear that the right is not absolute and that the state's interest in preventing adolescent suicide would outweigh any privacy interest the suicidal adolescent has in not having her suicidal impulses disclosed to her parents.

The cases concerning a patient's right to control medical treatment generally arise when a patient seeks to refuse a recommended course of medical treatment. The court decisions whether to allow a patient to refuse treatment follow a two-step process: (1) the court must determine whether the patient is competent to make the decision and, if not, who is to make the decision for her; and (2) the court must weigh the patient's interest in determining the course of her medical treatment against the state's interest in insisting the patient be treated.

As demonstrated below, the courts generally take two approaches to the determination of whether to allow a patient to refuse treatment: (1) If the patient is competent, the court will usually defer to her wish to refuse treatment if it can distinguish honoring her preference from the sanctioning of suicide; and (2) If the patient is not competent to determine her treatment, the court will balance the patient's prognosis and the intrusiveness of the treatment involved with the state's interest in preserving the life of the patient.

The wish of suicidal adolescents not to involve their parents in their treatment is tantamount to a wish to refuse treatment. Although courts use a variety of tests to determine whether patients are competent, most of them include at a minimum, the patients' appreciation of the con-

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111. The only Supreme Court decision thus far dealing with a minor's right to contraception has followed the same kind of significant state interest analysis as the abortion cases. In Carey v. Population Serv. Int'l, 431 U.S. 678 (1977), the Court, in a plurality decision, struck down a New York statute prohibiting the distribution of contraceptives to those under sixteen except by a physician in the course of practice. *Id.* at 691. The state contended that the statute was constitutionally permissible as regulation of the morality of minors and in furtherance of the state's policy against promiscuous sexual intercourse. The plurality opinion held that the right of privacy extends to minors as well as to adults and that the state did not have a significant state interest in denying minors access to contraception. *Id.* at 693-94. Justice Brennan, writing for the plurality, compared the interest of the state in the mental and physical health of the pregnant minor and in protection of potential life in the abortion decision to the area of contraceptives. *Id.* at 694. He stated that since those interests are clearly more implicated in the abortion decision a blanket prohibition of the distribution of contraceptives to minors was a fortiori closed. *Id.*

112. *See supra* note 19.

sequences of their decision and an understanding of the alternatives available to them. The emotional state of most suicidal adolescents would preclude them from meeting this standard and, therefore, a suicidal adolescent would not likely be considered competent to determine appropriate treatment.

Courts have used five common tests to determine whether a person is competent to make decisions regarding one's medical treatment:[113]

> The test most deferential to patient autonomy requires an individual merely to articulate a treatment choice. . . . A second test, frequently employed by medical and legal professionals, compares the patient's decision to the choice a reasonable person would make under similar circumstances. If the patient's decision seems unreasonable, then he or she is deemed incompetent . . . . The third test "examines the reasons for an individual's decision to accept or refuse treatment. . . . [A] person who gives rational reasons for his or her decision is competent, while one whose decision is 'due to or a product of mental illness' is incompetent."[114]

Finally, the fourth and fifth tests focus on the patient's ability to engage in the decisionmaking process, one measuring competence by the individual's apparent ability to understand generally the facts important to the treatment decision and the other questioning the patient's understanding of the specifics regarding the particular treatment in question.[115]

Courts applying the fourth and fifth tests have deemed patients competent even when there was evidence of some lack of proper mental functioning. For example, in *Lane v. Candura*,[116] the court judged a person competent who did not want to have her leg amputated. The court found that her testimony demonstrated lucidity on some matters and not on some others but that she did demonstrate a full appreciation of the consequences of the decision of whether to have her leg amputated and, therefore, was competent to make the decision.[117]

The only one of the above tests that the suicidal adolescent would satisfy is the first, the articulation of a treatment choice. However, given the state's strong interest in preventing suicide, a court would probably not apply this test to determine the competence of a suicidal adolescent

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113. See discussion of Roth, Meisel, and Lidz's analysis of these tests in Rebecca Dresser, *Article and Commentary on Anorexia Nervosa: Feeding the Hunger Artists: Legal Issues in Treating Anorexia Nervosa*, 1984 WIS. L. REV. 297, 349.

114. *Id.* at 349-51.

115. *Id.* at 351-52.

116. 376 N.E.2d 1232 (Mass. App. Ct. 1978).

117. *Id.* at 1235-36.

to make decisions regarding her treatment. Instead, there is a greater probability that a court would apply one or more of the other competency tests. If so, the court would most likely make one or more of the following determinations: (1) a reasonable person would not choose to exclude her parent from participating in her treatment if the parent's participation might help to save her life; (2) the suicidal adolescent's reasons for wishing to exclude her parents are not rational but the product of emotional illness; or (3) the impairment of the suicidal adolescent's mental functioning unlike, for example, the patient in *Lane*, is causing her to not fully appreciate the consequences of her actions.[118]

Moreover, even if a court were to find a suicidal adolescent competent to make a decision to refuse treatment, as discussed *infra*, the right to refuse treatment is not absolute. To the contrary, it involves a balancing of the patient's autonomy interest with the state's interest in protecting the patient and others. The state's interest in protecting the suicidal adolescent, the family, and others who would be affected by the suicide would most likely outweigh the suicidal adolescent's autonomy interest. Although the Supreme Court has not considered a case where a competent patient has wished to decline medical treatment, in *Cruzan v. Missouri Department of Health*,[119] a case dealing with the right of an incompetent patient to refuse treatment, the Court has addressed the right of competent patients to refuse treatment. The Court stressed that a competent patient's right to refuse treatment is not absolute and summarized the four state interests to be considered in determining whether to honor the wish of a competent patient to decline life-sustaining treatment: (1) preservation of life, (2) prevention of suicide, (3) safeguarding of the integrity of the medical profession, and (4) protection of innocent third parties.[120] The Court noted that, in cases that do not involve the protection of the actual or potential life of someone other than the decision-maker, the state's interest in preserving the life of the competent patient generally gives way to the patient's much stronger personal interest in directing the course of her own life.[121]

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118. There are many similarities between anorectic and suicidal adolescents and the issues pertaining to their competence to refuse treatment are analogous. *See* Dresser, *supra* note 113, at 347-49.

In a recent New Jersey case, the parents of an anorectic petitioned the court to declare their nineteen-year-old daughter incompetent so that they could have the authority to compel her to be treated. The petition was granted. Robert Hanley, *Parents File Suit to Battle 19-Year-Old's Anorexia*, N.Y. TIMES, July 18, 1992, at L29.

119. 110 S. Ct. 2841, 2851-52 (1990) (recognizing that both competent and incompetent patients have a liberty interest in making decisions regarding their medical treatment).

120. *Id.* at 2847-48.

121. *Id.* at 2847.

Before allowing a competent patient to refuse treatment, however, state courts have carefully weighed the patient's strong autonomy interest against the state interests summarized in *Cruzan*. *In re Farrell*,[122] for example, is a landmark case on the right of a competent patient to refuse life-sustaining treatment even if the refusal to maintain the treatment will result in her death. Ms. Farrell was a thirty-seven-year-old woman suffering from amyotrophic lateral sclerosis (ALS), often known as Lou Gehrig's disease. At the time of diagnosis, a victim's life expectancy, even with the life-sustaining treatment, was usually one to three years and there was no available treatment or cure. After she became ill, Ms. Farrell was admitted to a hospital where she underwent a tracheotomy and was connected to a respirator. When the hospital could provide no further help for her condition, she was returned home. She was paralyzed, confined to bed, and needed around-the-clock nursing care.

Ms. Farrell's husband petitioned the court to appoint him special medical guardian for his wife with specific authority to disconnect her respirator. A trial was conducted at Ms. Farrell's home. She testified that she had discussed her decision to withdraw the respirator with her husband, sons, parents, sister, and psychologist and that she had discussed the consequences of her decision with a respiratory specialist. She decided to disconnect her respirator because she was tired of suffering. The psychologist testified that the decision was not the result of a mere whim, but based on weekly discussions she had been having with Ms. Farrell over a six-month period.

The New Jersey Supreme Court distinguished allowing Ms. Farrell to disconnect her respirator from suicide in that her refusal of medical intervention merely allowed her disease to take its natural course.[123] If death were to occur eventually, it would be the result of the underlying disease, not of a self-inflicted injury.[124] The court further held that medical ethics created no tension in this case because the court's review of well-established medical authorities gave unanimous support to the right of a competent and informed patient such as Ms. Farrell to decline medical treatment.[125] Finally, the court noted that her children would not be harmed by the decision in that Mr. Farrell's capacity to care for them was unquestioned and she based her decision in part upon her recognition that her medical condition had already put the children under extreme stress.[126]

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122. 529 A.2d 404 (N.J. 1987).
123. *Id.* at 411 (quoting *In re* Conroy, 486 A.2d 1209, 1224 (N.J. 1985)).
124. *Id.*
125. *Id.* at 411-12.
126. *Id.* at 413.

Even if a suicidal minor were considered competent to determine her own course of treatment, application of the state interests discussed above makes clear that the state's interest in protecting adolescents from suicide would outweigh the adolescent's right to refuse parental participation in her treatment for several reasons.

First, the state's interests in preserving the life of a suicidal adolescent and in preventing her suicide are particularly strong because most suicidal adolescents do not wish to die[127] and are not able to understand the consequences of the suicidal act. In fact, the state would only be temporarily depriving the minor of any right to kill herself. Unlike the abortion situation, where intervention can only occur up to a specific time, a minor would always be able to take her life later.

Second, a provision allowing mental health professionals to notify the parents of a potentially suicidal adolescent patient that their child is suicidal would be consistent with the training[128] and the needs of mental health professionals.[129]

Third, the impact of an adolescent's suicide greatly affects the people around the adolescent.[130] Family members are deeply affected by the loss, as are other adolescents who are susceptible to the contagion of suicide. Therefore, the protection of the rights of others is implicated. In *Farrell*, in which there was a father who was willing and able to take care of the two mature children, in which the children had watched the mother's health decline and had seen her suffer, and in which the children were consulted about the mother's wish to remove her life sustaining support, the court reasoned that the mother's refusal of treatment would cause no harm to her children.[131] With suicide, the opposite is true. Those left behind will have had no opportunity to be aware of the adolescent's struggles and to be consulted on the effect of those struggles on themselves.

In addition, those adolescents who are not family members but who are profoundly affected by the suicide of another adolescent must be

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127. *See supra* note 13.

128. "Once the patient's suicidal thoughts are shared, the therapist must take pains to make clear to the patient that he, the therapist, considers suicide to be a maladaptive action, irreversibly counter to the patient's sane interests and goals; that he, the therapist, will do everything he can to prevent it . . . . It is equally essential that the therapist believe in the professional stance; if he does not he should not be treating the patient within the delicate human framework of psychotherapy." Harvey M. Shein, M.D. & Alan A. Stone, M.D., *Psychotherapy Designed to Detect and Treat Suicidal Potential*, 125 AM. J. PSYCHIATRY 1247, 1248-49 (1969).

129. CURRAN, *supra* note 3, at 146.

130. Stress on relatives can lead to physical exhaustion, migraines, hypertension, ulcers and even death. It almost invariably has a traumatic impact on parents. *See* FLANDERS, *supra* note 61, at 39.

131. 529 A.2d at 413.

considered. The death of a woman such as Ms. Farrell, who suffered from Lou Gehrig's disease, is a tragic loss to her family but an understandable one which a family can ultimately accept. It has no negative effect on society. The death of a physically healthy youngster through suicide, on the other hand, can have a traumatic and, indeed, deadly effect not only on her family but on many other vulnerable adolescents. Therefore, it strongly affects third parties and the state has a strong interest in taking measures to prevent this kind of death.

Thus, even if a suicidal adolescent were considered competent, the chances are extremely small she would have the right to refuse treatment. As demonstrated below, the chances are even smaller if the adolescent were considered incompetent to determine her treatment. The decision as to whether to allow an incompetent person to terminate treatment is a balancing process that has arisen mainly in cases where persons are in states of extreme and irreversible physical deterioration. Courts have authorized the refusal of treatment only when the patient's prognosis for the future was dim and the burden of the treatment under consideration was great. With proper treatment, a suicidal adolescent can recover.[132] Moreover, the treatment necessary, although painful, is not burdensome in the same way that the treatments under consideration in the "right-to-die" cases have been burdensome. Therefore, a court most likely would not allow a judgment to be made on behalf of a suicidal adolescent that the adolescent, if competent, would wish to refuse treatment.

Cruzan is typical of the fact pattern of the cases in which courts have been faced with the wish of an incompetent patient to refuse medical treatment. Ms. Cruzan had been in a vegetative state for five years, and her doctors agreed there was no hope she would recover. Her parents had sought authorization to remove her feeding tubes and needed to prove that their daughter would have wished to terminate treatment if she were competent to make that decision. An issue before the Supreme Court was the standard by which the parents had to prove their daughter's intent to refuse treatment.[133] The Court held that states may require clear and convincing evidence of an incompetent patient's desire to withdraw life sustaining equipment.[134]

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132. The path to recovery of one suicidal adolescent is presented in the story of Alana, *see supra* Introduction. In addition, a moving depiction of the recovery of a suicidal adolescent can be found in the 1980 film ORDINARY PEOPLE (Wildwood Enterprises 1980), which Curran describes as "brilliantly" portraying the struggle of a family to reintegrate a teenage son into the home following his hospitalization for a suicide attempt. CURRAN, *supra* note 3, at 88.

133. 110 S. Ct. at 2852.

134. *Id.*

Even when a state does not require clear and convincing evidence of a patient's desire to refuse treatment, similar considerations about the potential quality of the patient's life are taken into consideration when allowing the patient to refuse treatment. For example, in *In re Quinlan*,[135] a landmark case in which the New Jersey Supreme Court unanimously held that the right of privacy encompasses an incompetent patient's decision to decline medical treatment, the court allowed the parents and family of Karen Quinlan to determine that she would have wished to refuse treatment only after thoroughly balancing the interest of the state in preserving life against the interest of Ms. Quinlan in having the right to refuse medical treatment.[136] As a result of a coma, Ms. Quinlan was in a persistent vegetative state. The court noted that the state's interest weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims.[137] The court acknowledged the state's interest in preventing suicide but distinguished between the self-infliction of deadly harm and the self-determination against artificial life support or radical surgery in the face of irreversible, painful, and certain imminent death.[138]

As to determining Ms. Quinlan's intent, the court held that Ms. Quinlan's guardian and family should determine whether she would exercise the right of privacy under these circumstances.[139] If the guardian and family decided Ms. Quinlan would wish to terminate her treatment, this determination should be accepted by a society, the overwhelming majority of whose members would, in similar circumstances, exercise such a choice for themselves or for those closest to them.

Applying these standards, if a suicidal adolescent were considered incompetent to decide whether to refuse treatment, a court clearly would not authorize the refusal of treatment for the adolescent. Suicidal adolescents can recover. The intrusiveness of the treatment required is

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135. 355 A.2d 647 (N.J. 1976).

136. *Id.* at 663-64.

137. *Id.* at 664. The prognosis was that Ms. Quinlan would never resume cognitive life and the bodily invasion was great, including 24-hour intensive nursing care, antibiotics, the assistance of a respirator, a catheter, and feeding tube.

138. *Id.* at 669-70. The court held that upon concurrence of Mr. Quinlan and the family of Ms. Quinlan, if the responsible attending physicians concluded that there was no reasonable possibility of her ever emerging from her comatose condition to a cognitive, sapient state, and that the life support equipment should be discontinued, they should consult with the hospital "Ethics Committee" or like body of the institution in which Ms. Quinlan was hospitalized. *Id.* at 671-72. If this body agreed that there was no reasonable possibility of Ms. Quinlan's ever emerging from her comatose condition, the life support system could be withdrawn without any criminal or civil liability on the part of any participant. *Id.* at 672.

139. *Id.* at 664.

relatively minor. In addition, the determination of a suicidal adolescent not to allow her parents to participate in her treatment even if her parents' participation might help to save her life is not a determination that would be made by most members of our society for themselves or for those closest to them.

D. The Exercise of the State's Parens Patriae *Power as a Limit on Parental Rights*

As indicated in Part A of this section, at the same time that the Supreme Court has made clear that parents have a constitutionally protected interest in raising their children, the Court has also made clear that this interest is not absolute. To the contrary, the state's *parens patriae* interest in protecting children allows it to curtail the rights of parents when their actions are harmful to their child. Thus, allowing parental notification that an adolescent is suicidal should be constitutional if limited to those situations where the mental health professional has reason to believe that notification would be in the child's best interest.

In the landmark case *Prince v. Massachusetts*,[140] the Court made clear that the state in its role as *parens patriae* can restrict a parent's liberty interest, even when the parent's right of religious expression is implicated.[141] In *Prince*, the Court upheld the application of a law prohibiting the sale of merchandise in public places by minors to a nine-year-old child who was distributing religious literature with her guardian. The Court found that the state's interest in the health and well-being of young people was a significant secular end that justified the incidental burden on freedom of religion.[142] The Court stated unequivocally that the right to practice religion freely "does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or to death."[143]

Although the Court has not issued an opinion in a case involving a parent's right to decide upon a child's medical treatment, it summarily affirmed a case that affirmed the reasoning in *Prince*. In *Jehovah's Witnesses v. King County Hospital*,[144] the district court upheld two Washington statutes pursuant to which several of the plaintiff's children had been declared wards of the court for the purposes of administering blood transfusions. Relying on *Prince*, the district court held that it was appropriate to curtail a parent's autonomy in order to protect the health

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140. 321 U.S. 158 (1944).
141. *Id.* at 170.
142. *Id.* at 170-71.
143. *Id.* at 166-67.
144. 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968).

and well-being of her children, even when a parent's refusal to allow the blood transfusions was based on religious conviction.[145]

Thus, if the state determines that the parent's exercise of her liberty interest in directing the upbringing of her child is likely to be harmful to her child, the state's *parens patriae* power will prevail over the parent's liberty interest. Therefore, a rule providing for parental notification that an adolescent is suicidal only when notification to the adolescent would be beneficial to the child is within the state's *parens patriae* power and would be constitutional.

IV. Conclusion

Suicide has touched most of us at one time in our lives. I remember my friend Suki, a wonderful, lively, shining young woman, whom I met the summer before I went to college. We were both starting colleges in the Boston area and I visited her at her school one day in the fall. She seemed upset, homesick, and concerned about how she was adjusting to her new environment. The next time I called her she was no longer at school. When I called her at home, her parents told me she had killed herself.

This happened almost thirty years ago and I see Suki's face before me as clearly now as I saw it then. I do not know if she went for

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145. *Id.* at 504-05. Lower courts have followed the Supreme Court's lead in putting a child's health before a parent's right to carry out her religious beliefs in medical decisions pertaining to her children. In *In re* Sampson, 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970); *aff'd*, 278 N.E.2d 918 (1972), for example, a New York family court held that, even though a mother's objections to the administration of a blood transfusion to her deformed son were founded on scripture and sincerely held, they must give way before the State's paramount duty to insure his "right to live and grow up without disfigurement . . . his right to live and grow up with a sound mind in a sound body." 317 N.Y.S.2d at 652. Similarly, in *In re* Willmann, 493 N.E.2d 1380 (Ohio Ct. App. 1986), the Ohio Court of Appeals ordered the state to remove a cancer-stricken child from his parents' custody temporarily so that he might undergo potentially life-saving chemotherapy: "[T]he faith of the parents . . . does not permit them . . . to expose [their son] to progressive ill health and death." *Id.* at 1389.

Unless it is clear that a child will benefit from a proposed treatment, however, courts generally will not usurp a parent's autonomy to make decisions pertaining to her child's health. Thus, in *In re* Phillip B., 156 Cal. Rptr. 48 (Cal. Ct. App. 1979), for example, the court was asked to impose surgery over the objections of the parents of a 12-year-old child who suffered from both Down's syndrome and a congenital heart defect. The child's cardiologist recommended corrective heart surgery. Without the operation, Philip faced a life of only 20 years at the most, during which the heart defect would increasingly impair his energy and finally lead to a bed-to-chair existence. With the surgery, Philip faced possible complications, including the risk of death. The California Court of Appeals held that the state must satisfy a "serious burden" in order to justify the abridgement of parental autonomy and that the burden had not been met given the risks of the operation. *Id.* at 51.

counseling. If she did, I do not know if the counselor had reason to believe she was suicidal. And, if the counselor had reason to believe she was suicidal, I do not know whether the counselor contacted her parents. However, my sense was that Suki never gave herself or her parents a chance to work through her pain and to help her to heal. Perhaps if she had done so, she might be alive today.

Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration

Gary C. Leedes*

Introduction

In order to strengthen the United States Supreme Court's jurisprudence in Establishment Clause cases, this Article proposes a new, useful, and realistic model of adjudication. More specifically, the introductory section of the Fourteenth Amendment (the "citizenship declaration") is depicted as a bridge between the Establishment Clause and the three prohibitions in Section One of the Fourteenth Amendment. The citizenship declaration prohibits the federal and state governments from subverting a citizen's status in the political community because of his or her creed or lack of religious commitment. For example, some government endorsements of religion make nonbelievers feel like outsiders and second-class citizens. This is not permitted by the citizenship declaration. Using the principle of equal citizenship in Establishment Clause cases, there is no longer a need for judges to distort the meaning and significance of documents written by James Madison and Thomas Jefferson.

America's legal history is an ongoing dialogue between the past, present, and future. This complicated history can be organized and understood as an intelligible text. An important part of this text is the Fourteenth Amendment's citizenship declaration, which is a key provision subjecting state action to the prohibitions of the Establishment Clause.

Almost nothing in politics leads to more incongruous coalitions,[1] produces as many heated arguments, and excites deeper feelings than church-state issues. Pitted against secularists, reform Jews, liberal Catholics, and progressive Protestants on church-state issues are nearly all Christian fundamentalists, most conservative Catholics and many Orthodox Jews. Battles over the role of religion in public life and arguments over the allocation of government resources for religious purposes are

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1. On separation of church and state issues, there are more overlapping agreements and disagreements among secular and sectarian groups than many pundits realize. *See* Robert N. Bellah et al., The Good Society 181 (1991).

important in their own right and are linked closely to contests over family values, privacy rights, woman's rights, gay rights, multi-culturalism, funding for the arts, the content of public school textbooks, and similar contests too numerous to mention here.[2] The stakes are high because there are irreconcilable differences of opinion about the content of the common good, the existence and nature of truth, and the moral equivalency of life-style choices.

Many relentless secularists who condemn alliances between religious institutions and government[3] treat "religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere."[4] On the other hand, many cultural conservatives who believe that morality is reinforced by religion call the secularists misguided, elitist, paranoid, and intolerant. Bitterness between the warring camps causes politically destabilizing (even potentially violent) divisiveness along sectarian lines,[5] and the antagonists are not tranquilized by seemingly endless litigation. United States Supreme Court decisions often provoke new waves of impassioned rhetoric by those who care, and millions of Americans do care fervently about church-state issues.[6]

Many judges who decide church-state issues try to apply neutral principles of law. However, what one litigating side sees as neutrality, another sees as callous indifference or hostility.[7] Moreover, what one

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2. *See* JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA xi-xii, 52-64 (1991).

3. *See, e.g.*, Kathleen M. Sullivan, *Religion and Liberal Democracy,* 59 U. CHI. L. REV. 195, 213-14 (1992).

4. Michael W. McConnell, *Religious Freedom at a Crossroads,* 59 U. CHI. L. REV. 115, 120 (1992). Justice Black improperly referred to Catholics who favored textbook loans to religious schools as "powerful sectarian religious propagandists" whose "preferences and prejudices" impel them to look forward to "complete domination and supremacy of their particular brand of religion." *Id.* at 121 (quoting Board of Educ. v. Allen, 392 U.S. 236, 251 (1968)(Black, J., dissenting)).

5. After intimating in Lynch v. Donnelly, 465 U.S. 668 (1984), that political divisiveness was not ordinarily an independent ground for nullifying government support for religion, the United States Supreme Court changed its mind in Aguilar v. Felton, 473 U.S. 402 (1985). Showing its concern again in Lee v. Weisman, 112 S. Ct. 2649 (1992), the Court stated that "[t]he potential for divisiveness [along religious lines] is of particular relevance here." *Id.* at 2656. Justice Blackmun also observed that "[r]eligion has not lost its power to engender divisiveness." *Id.* at 2666 n.10 (Blackmun, J., concurring). Scholars share the Court's concerns about a *kulturkampf* (i.e, a culture war). *See, e.g.,* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT ix (1986).

6. "Of all the issues the ACLU takes on — reproductive rights, discrimination . . . police brutality, to name a few — by far the most volatile issue is that of school prayer. Michele A. Parish, *Graduation Prayer Violates the Bill of Rights,* 4 UTAH B.J. 19 (June/July 1991), *cited in* Lee v. Weisman, 112 S. Ct. 2649, 2666 n.10 (1992) (Blackmun, J., concurring).

7. The Court sometimes claims that governmental "neutrality" toward religion is

side views as benevolent, nonpreferential aid to mediating religious institutions, the other views as impermissible and threatening official sponsorship.

On church-state issues, reasonable moderates on both sides think the neutrality ideal is chimerical. For example, moderate accommodationists cannot understand how government aid to charitable nonreligious institutions is neutral if aid is not given to charitable religious institutions, and moderate secularists do not understand why the display of a religious symbol on government property is a legitimate accommodation, rather than an impermissible endorsement, of religion. Whatever the issue, and despite the judiciary's efforts to depoliticize religion and diminish disunity,[8] anger flares anew each time the United States Supreme Court interprets the Establishment Clause.[9]

In constitutional law cases, the meaning of the Constitution "is always partly determined . . . by the historical situation of the interpreter . . ." who understands the text in ways different from its authors.[10] Jurists, therefore, should concede that the Constitution's meaning is influenced by their cultural preconceptions and predispositions (avoidable and unavoidable). Judges should be self-consciously critical of their habits of thought.[11]

The Court's habitual repetition of its flawed reconstruction of the original meaning of the First Amendment's religion phrases is partly responsible for the deplorable condition of its Establishment Clause jurisprudence.[12] A former United States Solicitor General rates the doc-

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the preeminent goal of the First Amendment. *See, e.g.,* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 382 (1985); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 747 (1976) (plurality opinion); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973). However, the Court's concept of neutrality as applied does not always appear neutral to those excluded from programs because of their religious affiliations. For example, the principle that parochial schools may not obtain aid for secular programs identical to programs in public schools is arguably not neutral if an institution would be entitled to aid *but for* its religious affiliation.

8. In the view of James Madison, the more factions there were, the less likely were the chances of a coalition powerful enough to endanger religious liberty. WILLIAM L. MILLER, THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING 13 (1992).

9. U.S. CONST. amend. I. The First Amendment to the United States Constitution, in part, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise [of religion] . . . ." *Id.*

10. HANS GEORG-GADAMER, TRUTH AND METHOD 263 (Continuum 1975) (2nd ed. 1965).

11. *See* JOEL C. WEINSHEIMER, GADAMER'S HERMENEUTICS, A READING OF TRUTH AND METHOD 175 (1985).

12. There is discontent along the entire liberal-conservative spectrum of political thought. *See* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision,* 67 TEX. L. REV. 955, 956 (1989). The Court's Establishment Clause

trinal coherence of the Supreme Court's Establishment Clause cases on a scale of one to ten as between "zero" and "less than zero."[13] Because of a barrage of criticism directed against hyperactive judges (and other causes beyond the scope of this Article),[14] the public thinks we have a government of persons, not of laws. Before the general public became so aware of the Supreme Court's fallibility and lack of judicial restraint, the Justices could more easily convince the American people that the text of the Constitution, as illuminated by the intentions of the Founding Fathers, dictated their Establishment Clause decisions.

In *Everson v. Board of Education*,[15] the Court announced that the Establishment Clause (supplemented by the Fourteenth Amendment) means at least this: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."[16] To support this statement, Justice Black equated the prohibitions of the Establishment Clause with the provisions of Thomas Jefferson's "Virginia Bill for Establishing Religious Freedom."[17] Justice Rutledge also relied on history, especially Virginia's history. In dissent, he would have prohibited payment of bus fares for children who went to parochial schools even though the legislature authorized payment for all children transported to school.[18] According to Justice Rutledge, "[n]o provision of the Constitution is more closely tied to or given [more authentic] content by its generating history than the religious clause of the First Amendment."[19] A year later, in *Illinois ex rel. McCollum v. Board of Education*,[20] eight Justices endorsed without qualification the accuracy and sufficiency of Justice Rutledge's historical research.

Justice Rutledge considered the views expressed by James Madison during the Virginia disestablishment process as authoritative,[21] and wrote,

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tests consist of "contradictory principles, vaguely defined tests, and eccentric distinctions." Phillip T. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine,* 72 CAL. L. REV. 817, 817 (1984).

13. Rex Lee, *The Religion Clauses: Problems and Prospects,* 1986 B.Y.U. L. REV. 337, 338.

14. Other causes of public mistrust include, for example, the media's reportage, which has exposed the political agendas of the Court's left and right wings.

15. 330 U.S. 1 (1947).

16. *Id.* at 15.

17. *Id.* at 13. One version of Jefferson's Bill, dated June 12, 1779, is reprinted in 5 THE FOUNDERS' CONSTITUTION 77 (Phillip B. Kurland & Ralph Lerner eds., 1987).

18. 330 U.S. at 52-53 (Rutledge, J., dissenting).

19. *Id.* at 33 (Rutledge, J., dissenting). The opinions in *Everson* "invoked the names of Madison and Jefferson, singly or jointly, some three and half dozen times (excluding footnotes)." Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws Of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations,* 69 N.C. L. REV. 159, 175 n.83 (1990).

20. 333 U.S. 203 (1948).

21. As an antidote, see RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION

"[w]ith Jefferson, Madison believed that to tolerate any fragment of establishment would be [unacceptable]. Hence, [Madison] sought to tear out the institution not partially but root and branch and to bar its return forever."[22] Justice Rutledge's hero-worshipping narrative attaches undue importance to Virginia's "Bill for Religious Freedom," which does not in its enacting clauses expressly prohibit establishment of religion and to Madison's Memorial and Remonstrance against religious assessments (a petition more well known now than two centuries ago). Both documents have been cited and relied upon by courts in scores of cases,[23] although it is at best dubious to assume that the ratifiers of the First Amendment intended to impose upon the entire United States the same disestablishment policy that the Commonwealth of Virginia adopted.[24]

I. Demythologizing Jefferson and Madison

A Justice who relies on Thomas Jefferson must be very cautious. "Jefferson was not wholly consistent when it came to an establishment of religion."[25] His "views [on religion] were sufficiently unorthodox for him to take care that they [did] not become generally known."[26] Although ordinarily he was among the strictest of American disestablishment proponents, he did not object to some treaties and legislation that provided federal funds to meet the religious needs of Native Americans, and which "propagate[d] the Gospel among the Heathen."[27] He also used religion manipulatively to rally the colonists against Great Britain.[28]

Jefferson's contributions advancing the cause of disestablishment, although undeniably important, are often exaggerated by jurists. Indeed, the momentous social transformation called disestablishment cannot be reduced to anecdotes about Jefferson's efforts in Virginia during the 1780s. The disestablishment of religion has been a complex, variable

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125-32 (1987) (discussing why Justice Rutledge's position is weakly supported by the historical record).

22. *Everson*, 330 U.S. at 40.

23. Dreisbach, *supra* note 19, at 173-74 n.78.

24. *See* Mark D. Howe, *Religion and the Free Society: The Constitutional Question, in* Selected Essays on Constitutional Law 1938-1962, 780, 781 (Association of American Law Schools ed., 1963).

25. Levy, *supra* note 5, at 183. Jefferson, acting as Rector of the University of Virginia, did not entirely exclude religious education from the University, a point discussed at some length by Justice Reed. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 245-47 (1948) (Reed, J., dissenting). Madison approved of Jefferson's decision as rector. *Id.* at 248.

26. Garry Wills, Under God: Religion and American Politics 354 (1990).

27. *See* Levy, *supra* note 5, at 183.

28. Wills, *supra* note 26, at 359-60.

process occurring throughout the Western world over a long period of time.

Unlike the French immediately after the French Revolution, "the Americans did not regard their revolution as a repudiation of the Christian past."[29] Moreover, for believing Americans, the new nation under the new Constitution was "not perceived to be inimical to the Christian church or Christian beliefs."[30] Before 1800, in some respects, the disestablishment process in France,[31] Austria, and the Kingdom of Tuscany advanced faster than in Massachusetts.

The Court's doctrine which is shaped by its excessive reliance on Virginia's disestablishment of the Anglican Church is vulnerable to devastating criticism.[32] As Professor Howe wrote, "[b]y superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian and degraded the talents of the lawyer."[33] Fortunately, the Court today seems aware that the versions of history presented by Justices Rutledge and Black are incomplete. Nevertheless, judicial opinions still invoke the names of James Madison and Thomas Jefferson as if recurrence to their guiding principles were a simple hermeneutical task. Not so; our world view as we approach the 21st century is not the same as the founding generation's. There are continuities of course, but there are many discontinuities as well. Contrary to now-discredited hermeneutic theories, the past cannot be studied as if it is fixed or static.

The founding generation, on religious and other questions, was not of one mind but rather was split into politically partisan factions. The United States Supreme Court mistakenly emphasizes only one side of the debate that divided the young American republic's founding generation. It hears the voices of Jefferson and Madison but not Alexander Hamilton, Benjamin Rush, John Jay or political leaders in New England, like Noah Webster, who relied on government supported religion to inculcate civic virtue.

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29. *Id.* at 115.

30. MILLER, *supra* note 8, at 114.

31. The ultimate disestablishment, although temporary, occurred in France in 1795 when formal separation of Church and State was decreed and when Pope Pius VI became a French prisoner.

See PAUL JOHNSON, A HISTORY OF CHRISTIANITY 360 (1976).

32. *See* MARK D. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965). Justice Brennan warned against a "too literal quest for the advice of the Founding Fathers upon the issues of [religious establishment]." Abington School Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).

33. HOWE, *supra* note 32, at 4.

The Establishment Clause contains traces of meaningful information that are usually deleted in judicial opinions. The Court minimizes the importance of the earliest applications of the Establishment Clause by Congress, the courts, and by officials in the executive branch as if these telling state and federal precedents are *de minimis* or were inexplicable mistakes, e.g., laws against blasphemy, official resolutions for days of fasting and Thanksgiving, presidential inaugural addresses, and the appointment of Chaplains to the Congress. Indeed, the First Congress supported "sectarian education on Indian reservations, provid[ed] for religious objects on public property, and permitt[ed] public property to be used for religious purposes."[34] Apparently, the Court wants to have it both ways; it wants to rely on the history that supports its theory of the Constitution's religion provision and it wants to ignore the history that does not. For example, the Court has never addressed the apparent "conflict between Jefferson's law punishing 'Sabbath Breakers' and the strict separationist position attributed to Jefferson by the *Everson* Court."[35]

Writing "law office" history is not the Court's only failing. The Justices often approach their interpretive duties with too much of a clause-bound approach. The meaning of the Establishment Clause (and the known intentions of those who supported its inclusion in the Constitution) must not be interpreted only sentence by sentence; the provisions of the entire document must be read holistically and integrated with each other. For example, the Establishment Clause cannot be completely understood until it is juxtaposed, if not reconciled with, the Constitution's Preamble,[36] its Clause guaranteeing a republican government,[37] the Tenth Amendment,[38] the Free Exercise Clause,[39] and the declaration of citizenship in the Fourteenth Amendment, which secures the citizenship status of all persons born in the United States, regardless of their creed.[40]

In this Article, I criticize the arguments used by judges to justify their historically flawed Establishment Clause decisions. I suggest that judges who attempt to understand the lineage of the language of the Constitution in the context of history must recognize that the writings of Madison and Jefferson and the records of the Virginia disestablishment

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34. Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock,* 65 ST. JOHN'S L. REV. 245, 255 (1991). *See also supra* note 27 and accompanying text.

35. Dreisbach, *supra* note 19, at 204.

36. U.S. CONST. pmbl.

37. U.S. CONST. art. IV, § 4.

38. U.S. CONST. amend. X.

39. U.S. CONST. amend. I.

40. The Fourteenth Amendment reads in part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

process are merely small pieces in a large puzzle.[41] The Virginians' views were opposed in other regions of the country. Few of the Founders thought that the Establishment Clause of the First Amendment limits state power or preempts state constitutions advancing religion.[42] Even Jefferson understood that the United States Constitution did "not stop the States from assuming authority in the matters of religion."[43]

Madison and Jefferson were not one-dimensional thinkers. Their respective world views contained contradictions, some of which were irreconcilable. Their views on established religion were integrated with their views about science, religious enthusiasm, the moral sense, republicanism, separation of powers, federalism, and myriad other issues.

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41. Thomas Jefferson was not actually in the Country during the relevant time period. He sailed to Paris in 1784 as a United States Ambassador to France. *See* DUMAS MALONE, JEFFERSON THE VIRGINIAN 422 (1948). Jefferson sailed back home to America late in October of 1789. *See* Adrienne Koch & William Peden, *Introduction to* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON at xxvi (Adrienne Koch & William Peden eds., 1944). *See also,* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 85-86 (1982).

42. Justice Stewart grasped this point writing that:

> the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments. Each state was left free to go its own way and pursue its own policy with respect to religion.

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting). Justice Stewart noted that "it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy." *Id.* at 310.

Levy also writes: "As at the Constitutional Convention, a widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion." LEVY, *supra* note 5, at 74. *See also* CORD, *supra* note 41, at 40; WILBUR G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 8-10 (1964); MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND 163 (1984); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157-58 (1991); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause,* 82 NW. U. L. REV. 1113, 1132-35 (1988); Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 14 (1949); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481-82 (1991); Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment,* 2 WASHBURN L.J. 65, 66 (1962); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1201-02 (1990); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication,* 61 NOTRE DAME L. REV. 311, 317 (1986); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371-73, 406-07; William Van Alstyne, *What Is "An Establishment of Religion,"* 65 N.C. L. REV. 909, 910 (1987); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View,* 105 HARV. L. REV. 1700, 1700 (1992).

43. CORD, *supra* note 41, at 40.

Madison and Jefferson, who did not always agree with each other, were both willing to negotiate with their political opponents. Indeed, Madison was a successful politician not because he was doctrinaire but because he was willing to compromise,[44] even on some matters of principle.[45]

Madison's vision of disestablishment for Virginia was more comprehensive than most of his contemporaries who voted to ratify the First Amendment in order to prevent Congress from meddling with state establishments.[46] This policy of nonintervention was, in effect, a multilateral nonaggression pact. The ratifying conventions in each state after the summer of 1787 and the verbal exchanges in the First Congress during the summer of 1789 strongly suggest that the polemics of both Madison and Jefferson (regarding the nature and pace of disestablishment in Virginia) diverged from the ideas of most Americans.[47] Both Virginians were ahead of their time, and their advocacy was not always indicative of public opinion.

Madison's Remonstrance (circa June 1785), the now famous petition listing objections to Patrick Henry's bill providing tax funds to teachers of the Christian religion, was a broadside that has gained in stature and influence[48] since it was written anonymously and considered at the

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44. Madison was not a rigid ideologue "nor a man of doctrinaire temperament, nor marked by any nostalgia for the absolute." MILLER, *supra* note 8, at 285. He was among other things a "tactician, the compromiser, the 'skillful organizer who could keep various factions and pressure groups together'." *Id.* at 12. When his proposals for a bill of rights were opposed, he skillfully set about bringing his opponents into the fold. *Id.* at 268.

45. For an unusually informative article proving that Madison and Jefferson were willing to compromise their principles during the Virginia disestablishment process, see generally, Dreisbach, *supra* note 19, at 159. Jefferson apparently authored *A Bill for Appointing Days of Public Fasting and Thanksgiving*, *id.* at 193, and *A Bill Annulling Marriages Prohibited by the Levitical Law, and Appointing the Mode of Solemnizing Lawful Marriage*. *Id.* at 199. Dreisbach writes, "Jefferson [at least in the 1780s] may have held a more accommodating view of church-state relations than the strict separationist version of legal history would suggest." *Id.* at 203. "While Madison's 'Memoranda' and Jefferson's 'wall [of separation]' metaphor are frequently invoked by the judiciary, their 'Bill for Appointing Days of Public Fasting and Thanksgiving' is largely forgotten." *Id.* at 195. For another discussion of Jefferson's *Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers*, see Robert L. Cord, *Interpreting the Establishment Clause of the First Amendment: A "Non-Absolute Separationist" Approach,* 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 731, 735-36 (1990).

46. The Court, contrary to the founding generation, treats the establishment-of-religion issue by local officials as legally impermissible.

47. Madison and Jefferson both knew that for many Americans religious loyalties were more obligatory than loyalty to the nation. BELLAH ET AL., *supra* note 1, at 181.

48. *See* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 143 (1986).

time "a mite excessive."[49] For example, Madison went into rhetorical overdrive when he suggested that Patrick Henry's proposed tax was, in principle, as objectionable as the Inquisition.[50] In his Remonstrance, Madison's entire list of argumentative objections to the proposed tax assessment did not express the national will[51] respecting disestablishment because by 1791, national disestablishment issues were discussed in the context of a debate over states' rights. Judges, advocates, and academics on opposite sides of contemporary church-state issues, however, cite passages from Madison's memorabilia as if Madison himself anticipated the Fourteenth Amendment issues that are now being brought to the Court.

The fact that we delude ourselves about our history when we think we are not deluding ourselves is a puzzling irony developed by contemporary hermeneutists.[52] "Constitutional history almost always suffers from what T.S. Eliot described as the cruelty of mixing memory with desire."[53]

Contrary to legends popularized by the Court, Madison's views changed over time and the views he expressed in public changed depending on his various roles as advocate, candidate for office, member of the Virginia General Assembly, member of the United States House of Representatives, President, private letter writer, and writer of memoranda[54] published posthumously. For example, all the arguments in Madison's Remonstrance against a bill attempting "to enforce by legal sanctions, acts obnoxious [to most Virginians]"[55] were not entirely germane when he served in the United States House of Representatives and proposed amendments to the Constitution. Obviously, Madison's role in the House was different from his role as a ghost writer for a Presbyterian faction. His role was also different when he served in the Virginia General Assembly. For example, in 1785, he introduced a bill (probably drafted

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49. WILLIAM L. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 137 (1985).

50. *Id.*

51. When published in 1785, the Remonstrance was not the most widely supported published petition protesting Patrick Henry's Assessment Bill. *See Id.* at 39.

52. *See generally* GEORG-GADAMER, *supra* note 10.

53. Philip B. Kurland, *The Origins Of The Religion Clauses Of The Constitution*, 27 WM. & MARY L. REV. 839, 860 (1986) (invoking T.S. Eliot, *The Waste Land*, *in* COLLECTED POEMS 1909-1962, at 53 (1963)).

54. Madison's views in the so-called Detached Memoranda written during his declining years, although often cited by judges, do not necessarily coincide with his views in 1789 when he proposed amendments to the Constitution including the precursor of the Establishment Clause.

55. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, supra note 17, at 84.

by Jefferson) providing for punishment of "sabbath breakers."[56] One of his biographers describes how Madison adeptly shifted his roles from "the statesman of artful accommodations" to "single-principled absolutist."[57]

Madison's arguments why Christian teachers should not be paid by the government's treasury in 1785 were cited by the Court in *Lee v. Weisman*[58] to justify its condemnation of graduation prayers in public schools, but Madison's own arguments against chaplains to Congress were not heeded by the House of Representatives and Senate whose resolutions authorized the national Treasury to appoint and pay their official chaplains in 1789 and 1790.[59] Congressional action appointing chaplains and endorsing prayer might show that Congress deviated from the Constitution's principles as Justice Souter recently argued,[60] but it also tends to prove that Congress did not agree with Madison's privately published interpretations of the Establishment Clause.

By 1789, Madison had become the nation's most important advocate for a bill of rights.[61] Nevertheless many facets of the Virginian's views were not known,[62] understood, debated, or approved by most ratifiers of the Establishment Clause. Furthermore, "[t]here were important changes in . . . language as these proposed amendments passed from James Madison's hand, on June 8, 1789, through the complicated process in the House, the Senate, the conference committee, and the ratifications

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56. Dreisbach, *supra* note 19, at 190. The religious nature of the bill punishing sabbath breakers is undeniable; it was *not* introduced primarily for secular purposes. *See id.* at 191.

57. MILLER, *supra* note 49, at 137.

58. 112 S. Ct. 2649, 2657 (1991).

59. The House and Senate, even after proposing the Establishment Clause for ratification, appointed paid Chaplains to both houses of Congress. *See* 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791 251, 254, 623-25 (Linda Grant De Pauw ed., 1977). *See also* Letter from James Madison to Edward Livingston *(July 10, 1822) reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 105 (containing Madison's explanation of his position at the time). This letter was cited by Justice Souter in *Weisman*, 112 S. Ct. at 2675 n.6 (Souter, J., concurring). Justice Souter understands, however, that "the Framers simply did not share a common understanding of the Establishment Clause." *Id.*

60. *Weisman*, 112 S. Ct. at 2675.

61. MILLER, *supra* note 8, at 6. Madison screened the proposed amendments to the Constitution and decided which ones were not likely to be seriously controversial. *Id.* at 253. He did some editing, and engaged in considerable prodding. *Id.* at 252. The list of rights that were eventually ratified through his leadership were similar to those selected by Madison, although the proposed amendment he thought most important, dealing with limitations on state power to regulate religion, did not survive in the Senate. *Id.* at 252-259.

62. Madison in the 1780s was reluctant to admit that he wrote the Remonstrance. MILLER, *supra* note 49, at 98.

by the state legislatures, into the Constitution of the United States on December 15, 1791."[63]

Seemingly oblivious to problems caused by excessive reliance on selected snippets from Madison's writings, Justice Blackmun in *Weisman* relies on Madison's Remonstrance as if it memorializes the founders' understanding of the First Amendment's unchanging meaning.[64] This type of propaganda is needlessly primitive. Justice Souter, concurring in *Weisman*, cites Madison's "Detached Memoranda"[65] which are not a reliable record of the national will that prevailed when the First Amendment was ratified. Written in Madison's declining years between 1817 and 1832, the Memoranda contain personal opinions that contradict some of Madison's other writings and actions concerning disestablishment.[66]

Let me now clarify what I am not arguing. I am not denying that Madison and Jefferson were remarkably influential leaders of public opinion, and I concede that late eighteenth century history is pertinent in Establishment Clause cases brought under the Fourteenth Amendment. I am arguing, however, in support of a diachronic rather than a synchronic view of history. Instead of isolating a slice of time— for example, the period between 1785 and 1791—the Court should consider the sweep of history that indicates the long term dialogical and doctrinal continuities and discontinuities that are relevant in a particular case.

Instead of a diachronic approach, the Court isolated brief fragments of recorded history when, citing the words of Jefferson, Justice Black attempted to "erect 'a wall of separation between Church and State.' "[67] The Court did not give any weight to the opinions of leaders who disagreed with Jefferson and his allies. The Court in 1947 did not consider the anti-slavery origins of the Fourteenth Amendment's citizenship declaration, which arguably prohibits noncoercive state aid to religion only if it subverts a person's citizenship status. Clearly, the Court in *Everson* was attempting to transform the American people's understanding of their past in order to influence their future.[68] *Everson's*

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63. MILLER, *supra* note 8, at 259.

64. *Weisman* 112 S. Ct. at 2666 (Blackmun, J., concurring).

65. *Id.* at 2673, 2675, 2675 n.6 (Souter, J., concurring).

66. CORD, *supra* note 41, at 30-31. I should point out that Justice Souter does not rely on Madison as much as on Justices Rutledge, Black, or Blackmun; his point is that the critics of the Court's rendition of history have not presented arguments that are cogent enough to overturn prior precedent. *See Weisman*, 112 S. Ct. at 2673-76 (Souter, J., concurring).

67. Everson v. Board of Educ., 330 U.S. 1, 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

68. In *Weisman*, Justice Blackmun cited Justice Black's dicta, calling it "the touchstone of Establishment Clause jurisprudence." 112 S. Ct. at 2662 (Blackmun, J.,

dicta led to the school prayer cases in the 1960s[69] and scores of other decisions condemning relationships between local governments and religious institutions.

Because of *Everson*, the federalism shield limiting the reach of the Establishment Clause has ironically been transformed into a sword for attacking state laws respecting religion.[70] The judge-made doctrine incorporating the Establishment Clause as a negation of the States' power to aid religion noncoercively and nonpreferentially seems entrenched for the foreseeable future.[71] The Court's muddled theory of selective incorporation can be improved without a dramatic invalidation of precedent if the Court uses the Fourteenth Amendment's declaration of citizenship, which protects the immunities of individuals in addition to their liberties.[72]

According to the model described in this Article, if the government endorses religion and if the endorsement detracts from a person's citizenship status, then the citizenship declaration, which augments the Establishment Clause, is violated. Consider, for example, the situation of Jews in the United States.[73] In the words of Professor Alan Dershowitz, "[t]he separation of church and state in America is the foundation on which the first-class legal status of American Jews rests."[74] He is partially correct; his emphasis on separation, however, does not fully guarantee the status of Jews; the Fourteenth Amendment's declaration of citizenship does (explained below in Section IV).

Dershowitz writes, "The goal of the Christian right is to convert Jews, or at the very least, to relegate them to second class status in their Christian America."[75] Although Dershowitz's assertion is overin-

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concurring). Justice Souter referred favorably to dicta in *Everson* prohibiting any and all aid to religion even if State programs "aid all religions." *Id.* at 2667 (Souter, J., concurring) (quoting *Everson,* 330 U.S. at 15). Justice Stevens and Justice O'Connor joined the concurring opinions of Justices Blackmun and Souter. *Id.* at 2661, 2667.

69. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (holding the practice of daily Bible reading and recitation of Lord's Prayer in elementary and secondary public schools unconstitutional); Engle v. Vitale, 370 U.S. 421 (1962) (holding the practice of reciting a nondenominational prayer written by state officials unconstitutional).

70. CURRY, *supra* note 48, at 208. Levy concedes that "religion as a subject of legislation was reserved exclusively to the states." LEVY, *supra* note 5, at 74. He adds, however, that "[t]o expect the Supreme Court to turn back the clock by scrapping the entire incorporation doctrine is so unrealistic as not to warrant consideration." *Id.* at 166.

71. *See Weisman*, 112 S. Ct. at 2673 n.4 (Souter, J., concurring).

72. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 52 (1989).

73. The status and standing of Jews in the United States is vastly different from countries where, throughout history, they have been unwelcome, vilified, and savagely persecuted.

74. ALAN M. DERSHOWITZ, CHUTZPAH 313 (1991).

75. *Id.* at 336.

clusive, courts must protect all citizens vigorously when government endorsements of religion subvert any person's citizenship status and immunities. Recently, however, the Court has observed that "'the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause'."[76] Accordingly, the government does not establish religion when it is necessary to "lift a discernible burden on the free exercise of religion."[77] This position leads to the accommodationists' interpretation of the Establishment Clause.[78] Yet, how far down that road will the Court travel? Moderates on the Court have signified most recently in *Lee v. Weisman* that there is a line beyond which the government may not accommodate religion.[79]

Weisman was not an easy case because the record barely supports Justice Kennedy's inference that petitioner Deborah Weisman was psychologically coerced to participate in the religious exercise she challenged as unconstitutional,[80] especially in view of her counsel's stipulation that her attendance at graduation was "voluntary." Deborah was not coerced by state law, as Justice Scalia asserts with some rancor.[81] Justice Kennedy explained, however, that official school policy forced Deborah to choose

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76. Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987) (citing Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 (1987)).

77. Lee v. Weisman, 112 S. Ct 2649, 2677 (1992).

78. Accommodationist Richard John Neuhaus, author of the influential *The Naked Public Square*, thinks "it is past time" for the Court to recognize candidly that "[i]n a society that is strongly and pervasively religious, it is not possible to have a government that is both democratic and, at the same time, indifferent or hostile to religion." Richard J. Neuhaus, *The Naked Public Square: A Metaphor Reconsidered*, *in* FIRST THINGS 78, 80 (The Inst. on Religion and Public Life ed., May 1992).

79. In *Weisman* a trio of Justices having varying degrees of enthusiasm for accommodation (Justices O'Connor, Souter, and Kennedy) joined with two Justices with stricter separationists views (Justices Blackmun and Stevens) and voted together as the Court condemned a nonsectarian prayer delivered by a rabbi at graduation exercises at a public school. Justice Souter decided that "the graduation prayers at issue . . . crossed the line from permissible accommodation to unconstitutional establishment." *Weisman*, 112 S. Ct. at 2677 (Souter, J., concurring).

80. The Court's finding of coercion was predicated on the following facts not disputed by the litigants: In 1989, a public school principal decided to include as part of a graduation ceremony an invocation and benediction. Over the objections of Deborah Weisman and her father, the principal selected a clergyman, in this case a rabbi, to lead the audience of children and adults assembled in prayer. The rabbi was advised to deliver a non-sectarian prayer, and the school principal provided him with guidelines distinguishing between appropriate and inappropriate prayers. *Weisman*, 112 S. Ct. at 2652-53. The rabbi chose a prayer that was based in part on the Book of the Prophet Micah, Ch. 6, v. 8 from the Hebrew Scriptures. *Id.* at 2664 n.5 (Blackmun, J., concurring).

81. *Id.* at 2683-84. (Scalia, J., dissenting).

between "social isolation"[82] and "prayers [that] were offensive."[83] Arguably for many teenagers in Deborah's situation, the only realistic alternative is to submit to a religious exercise that is offensive—since a graduation ceremony to most adolescents "is one of life's most significant occasions."[84] Given this scenario, described with an empathy not present in the dissenting opinion (which implies that Deborah is a little too thin-skinned for her own and society's good), the Court held that "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation."[85]

An accommodationist whose citizenship status is not threatened by the anti-Semitic currents in public opinion might wonder why Deborah cannot take the bitter with the sweet? Is the "bitter" (i.e., the subtle, psychological coercion of peer pressure) really the functional equivalent of "legal coercion?[86] The answer is yes, according to Justice Kennedy, although his concept of psychological coercion has the potential—as pointed out by Justice Scalia—of being "a boundless and boundlessly manipulable test," one that varies in accordance with the "philosophical predilections of the Justices."[87] Despite this dangerous potential, the general principle "that the government may no more use social pressure to enforce orthodoxy than it may use more direct means"[88] is, in theory, judicially manageable. Moreover, the controversial principle protects the citizenship status of persons who are stigmatized as outsiders if they do not submit to social pressures exerted by government officials.

Court watchers had expected Justice Kennedy to adhere to the principles he expressed in *County of Allegheny v. ACLU*,[89] in which he attacked the Court's "unjustified hostility toward religion."[90] Although Justice Kennedy's *Weisman* opinion modifies his previously stated position that "the Establishment Clause must be construed in light of the '[g]overnment policies of accommodation, acknowledgment, and support

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82. *Id.*
83. *Id.* at 2659.
84. *Id.*
85. *Id.* at 2660.
86. *Id.* at 2683 (Scalia, J., dissenting).
87. *Id.* at 2679 (Scalia, J., dissenting). The dissenters concede that government-sponsored endorsement of [sectarian] religion is out of order but not "the officially sponsored non-denominational invocation and benediction read by Rabbi Gutterman." *Id.* at 2684 (Scalia, J., dissenting).
88. *Id.* at 2659. As Professor McConnell wrote prophetically before *Weisman*, there is an element of coercion when a student, in order to attend her graduation, is forced to become a member of a captive audience which is subjected to a prayer, the content of which is influenced by the government. McConnell, *supra* note 4, at 158.
89. 492 U.S. 573 (1989).
90. *Id.* at 655 (Kennedy, J., concurring in the judgment and dissenting in part).

for religion [that] are an accepted part of our political and cultural heritage,'"[91] nothing in *Weisman* departs his general view that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself be inconsistent with the Constitution."[92]

Significantly, Justice Kennedy did not rely on the guidelines of *Lemon v. Kurtzman*,[93] which have failed to produce a coherent body of law.[94] The so-called *Lemon* "guidelines,"[95] although more accommodating than strict separationism, have confused lawyers and judges and have caused persistent divisions among the Justices of the Supreme Court. The Court in *Weisman*, however, declined invitations to abandon *Lemon*.[96] Instead, it relied on a rule inferable from previous precedent: *viz.*, no public school below the college level "can persuade or compel a student to

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91. *Weisman*, 112 S. Ct. at 2678 (Scalia, J., dissenting) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment and dissenting in part)).

92. *Id.* at 2661.

93. 403 U.S. 602 (1971). To satisfy the Establishment Clause under the three *Lemon* guidelines, "a governmental practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." *Weisman*, 112 S. Ct. at 2654. The first two guidelines are derived from Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); the third is taken from Walz v. Tax Comm'n, 397 U.S. 664 (1970).

94. Chief Justice Burger, the author of *Lemon,* admitted "[c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of law." Lemon v. Kurtzman, 403 U.S. at 612. Justice White claims that the *Lemon* test "sacrifices clarity and predictability for flexibility." Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980). Justice Scalia calls the Supreme Court's establishment clause jurisprudence "embarrassing." Edwards v. Aguillar, 482 U.S. 578, 639 n.7 (1987) (Scalia, J., dissenting), and describes the *Lemon*-guided decisions as variations on a "theme of chaos." *Id.* at 640. Chief Justice Rehnquist, referring to *Lemon*, called it a theory that "has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results." Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, C.J., dissenting). Justice O'Connor has expressed doubts about the test. *See, e.g.,* County of Allegheny v. ACLU, 492 U.S. 573, 623 (1989); Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting). An inviting pre-*Weisman* opinion written by Justice Kennedy indicates that a "[s]ubstantial revision of our Establishment Clause doctrine may be in order." County of Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in the judgment and dissenting in part).

95. It was Chief Justice Burger himself who explained that the three factors function as a guideline, not a test. *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984). "Since 1971, the Court has decided 31 Establishment Clause cases" and prior to *Weisman*, it had rested all of those decisions, save one, "on the basic principles described in *Lemon*." *Weisman,* 112 S. Ct. at 2663 n.4 (Blackmun, J., concurring). The exceptional case was Marsh v. Chambers, 463 U.S. 783 (1983) (upholding prayer opening a session of the state legislature).

96. *Weisman,* 112 S. Ct. at 2655. The lower courts had relied on *Lemon*, as the Court noted. *Id.* at 2654-55.

participate in a religious exercise."[97] The Court's expanded conception of impermissible coercion in *Weisman* allowed it to postpone the difficult business of clarifying or replacing the *Lemon* framework of analysis.

What is needed is a new and enduring model of adjudication that is based on guidelines that can be plausibly derived from the Constitution. Saying what is needed is obviously easier than providing an exemplar that fulfills the need. Section IV of this Article constructs a new framework of analysis that is faithful to the Constitution's text read holistically. However, the state constitutions in effect at the time the Establishment Clause was ratified must be taken into consideration. They created a diminished citizenship status for non-Christians. Indeed, the endorsements of religion in many late-eighteenth century state constitutions demonstrate why the Court's version of American history is flawed, incomplete, and misleading.

II. The Diminishing but Lingering Influence of Christianity in State Constitutions

In 1740, a combination of religious beliefs and social attitudes known as Puritanism was still the strongest cultural force in the New England colonies destined to become independent States.[98] By 1776, the year of the Declaration of Independence,[99] such habits of mind had been unsettled by influences stemming from "the Enlightenment, and several variants of traditional Christianity."[100] Nevertheless, the heady wines of spirit-filled revivalism and the Enlightenment were imbibed with moderation in North America, where traditional modes of Christianity remained an inhibiting reality.

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97. *Id.* at 2661.

98. A. James Reichley, Religion in American Public Life 6 (1985).

99. The self-evident truths of the Declaration drew upon English legal theory, the Whig political tradition, and Enlightenment themes that melded with Puritan covenant theology. During the 18th century Enlightenment, new thinking in theology demystified medieval and post-Reformation dogmatics. The Founding Generation was influenced by John Locke's political theories and his great work, *The Reasonableness of Christianity* (1695), which exalted human reason without denying the Gospel. Lest we forget, however, the Declaration's first paragraph contains two references to the Deity: "Nature's God" and "Creator." In the final paragraph, there are two more references: "Supreme Judge of the world" and "Divine Providence." *See* The Declaration of Independence para. 1-2 (U.S. 1776). "[T]he signers generally agreed that a transcendent Creator had conferred certain inalienable rights that were beyond the dominion of human government." Arlin M. Adams & Charles J. Emmerich, A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses 8 (1990). For a general discussion of the Declaration's religious references, see Asan P. Stokes & Leo Pfeffer, Church and State in the United States 561-66 (Greenwood Press rev. ed. 1975) (1964).

100. Reichley, *supra* note 98, at 6.

In the new Federal Constitution, no provision was made for a state supported church, and persons were not required to take any sort of religious oath or test in order to hold a public office of the United States.[101] It is a mistake, however, to think that secularists desiring separation of church and state achieved their goals. The ties between the several states and religious institutions were left undisturbed by the Constitution. As William Lee Miller writes, "[a]lthough the Christian religion in Europe was often, and often seen to be, the great opponent of the modern age—of liberalism, of republicanism—in the United States it was no opponent but a friend."[102] With the advent of the new Constitution, there was only one United States, not two, as there were two Frances, two Italys and two Spains. The United States had "not divide[d] politically or systematically along a religious faultline."[103]

Most disestablishmentarians in the United States were not zealously anti-religious like the revolutionaries in France. Disestablishment did not mean that Christianity would be confined to a ghetto totally isolated from the public square. The founding generation,

> explicitly disentangled themselves from . . . hierarchy, and implicitly repudiated priesthood, and set in place a new nation with liberty and equality at the center, without casting the Christian religion as an opponent.
>
> The United States managed to come into being as a modern democratic state with the connection to the Christian past unbroken.[104]

Although the influence of Christianity persisted, "every colony-turned-state altered the Church-State arrangements it had inherited from colonial times."[105]

At the time the Bill of Rights was ratified, "[t]he pattern of establishment was bewilderingly diverse. . . . Some [jurisdictions] maintained dual establishments, others multiple establishments [of several denominations and sects] with free exercise for dissenters."[106] According to Leonard W. Levy, six of the original thirteen states had multiple

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101. The Constitution provides, "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, § 3.

102. MILLER, *supra* note 8, at 114.

103. MILLER, *supra* note 8, at 115.

104. MILLER, *supra* note 8, at 116.

105. CURRY, *supra* note 48, at 134.

106. LEONARD W. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 196 (1972).

establishments;[107] namely, Connecticut, New Hampshire, Massachusetts, Maryland, Georgia, and South Carolina.[108] Professor Levy does not consider the laws in force at the time in Rhode Island, Delaware, Pennsylvania, or New Jersey to be establishments.[109] His conclusion is questionable; laws in those states disfavored non-Christians and in some instances Roman Catholics. The following summary of *all* the state constitutions discloses that there were elements of established religion remaining in each state at the time the First Amendment was ratified.

In Rhode Island, perhaps the most tolerant state, Catholics were ineligible for public office and Jews, although free to practice their religion, were considered "second class citizens."[110] Delaware's Constitution also discriminated in favor of Christians. It provided that "all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state."[111] Pennsylvania, as late as 1790, excluded from public office atheists and those who did not believe in "a future state of rewards and punishments."[112] Pennsylvania's discrimination was not considered invidious by disestablishmentarians in the late eighteenth century only because "the values, customs, and forms of Protestant Christianity thoroughly permeated civil and political life."[113] The same values underpinned New Jersey's constitution of 1776, which provided that "no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles."[114]

Maryland's constitution of 1776 granted equal religious liberty only to "persons professing the Christian religion";[115] it also authorized "a general and equal tax, for the support of the Christian religion."[116] Moreover, there was a religious test for office holders who were required to declare a belief in the Christian religion.[117] A tax supporting religion

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107. A multiple establishment, according to Levy, exists when the state provides impartial tax support of religious institutions. *Id.* at 202.

108. *Id.* at 197-99.

109. *Id.* at 192.

110. CURRY, *supra* note 48, at 91. Curry describes the situation in Rhode Island helpfully and succinctly. *Id.* at 90-91.

111. DEL. DECLARATION OF RIGHTS of 1776, § 3, *reprinted in* ADAMS & EMMERICH, *supra* note 99, at 116.

112. CURRY, *supra* note 48, at 161 (quoting PA. CONST. of 1790).

113. CURRY, *supra* note 48, at 219.

114. N.J. CONST. of 1776, art. XIX (1776) *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 71.

115. MD. CONST. of 1776, *Declaration of Rights*, no. 33, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 70.

116. MD. CONST. of 1776, *Declaration of Rights*, no. 33, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 70.

117. MD. CONST. of 1776, *Declaration of Rights*, no. 33, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 70.

was not repealed until 1810, but even then "Maryland continued . . . to proclaim itself a Christian state and to exclude non-Christians from office."[118] "[N]on-Christians would achieve political and civil rights [in Maryland] only after a bitter struggle in the early nineteenth century."[119]

South Carolina's constitution of 1778 provided *inter alia* that "[t]he Christian Protestant religion shall be deemed . . . the established religion."[120] Moreover, it stated that "God is publicly to be worshipped," "[t]hat the Christian religion is the true religion" and "[t]hat the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice."[121] Although individuals were not obligated to support any "religious worship,"[122] the Constitution excluded non-Protestants from "equal religious and civil privileges."[123] The establishment of religion by South Carolina's Constitution could not be more explicit.[124] Georgia's Constitution, drawn in 1777, "limited officeholding to Protestants," and "made possible a general assessment type of support of religion."[125] A statute enacted in 1785 contained language designating Christianity as the established religion.[126]

Similarly, according to North Carolina's constitution of 1776, persons who denied the truth of the Protestant religion were "[in]capable of holding any office or place of trust or profit in the [state's] civil department."[127] Eligibility for public office was not extended to *all* Christians until 1835.[128] The disabilities of Jews in North Carolina were not removed until 1868 when the state "constitution was changed to

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118. CURRY, *supra* note 48, at 157.

119. CURRY, *supra* note 48, at 158. Maryland's religious test stayed in force until invalidated by the Supreme Court in Torcaso v. Watkins, 367 U.S. 488 (1961).

120. S.C. CONST. of 1778, art. XXXVIII, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 76. "The Episcopal was made the State Church in South Carolina by its first constitution, 1776." 1 FRANCIS N. THORPE, A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE 1760-1850 53 (1898).

121. S.C. CONST. of 1778, 5 THE FOUNDERS' CONSTITUTION *supra* note 17, at 76. *See also* ADAMS & EMMERICH, *supra* note 99, at 118.

122. *See supra* note 121.

123. *See supra* note 121.

124. As Stokes and Pfeffer correctly conclude, South Carolina continued to maintain its religious establishments. *See* STOKES & PFEFFER, *supra* note 99, at 81.

125. CURRY, *supra* note 48, at 153.

126. The statute provided in part "that as the Christian religion redounded to the benefit of society, its regular establishment and support is among the most important objects of legislative determination." *Id.*

127. N.C. CONST. of 1776, art. XXXII, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 71. The Constitution excluded ministers from the legislature and limited officeholding to Protestants.

128. STOKES & PFEFFER, *supra* note 99, at 72.

disqualify from public office only persons 'who [shall] deny the being of Almighty God'."[129]

During the disestablishment process in Virginia, many opponents of the established religion wanted to eliminate laws burdening religious liberty, and some wanted to go further and keep the Gospel pure from the contaminating influence of government.[130] They suffered a setback in December 1784 when Virginia passed an act incorporating the Episcopal Church.[131] Almost immediately thereafter, however, the Old Dominion's disestablishmentarians were encouraged[132] when Patrick Henry's General Assessment Bill[133] died in committee.[134] In its place, the governor signed Virginia's Act for Establishing Religious Freedom[135] in January, 1786

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129. STOKES & PFEFFER, *supra* note 99, at 72 (quoting 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 38 (Francis N. Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]).

130. "The most intense religious sects opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities." Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion,* 103 HARV. L. REV. 1410, 1438 (1990). James Madison championed their cause well. Jefferson also argued at times that true religion was corrupted by government. He wanted "to protect religion, not dishonor it, by disestablishment." WILLS, *supra* note 26, at 372. Jefferson also supported disestablishment because he objected to irrational religion's power over the electorate but he did not often make this argument in public. WILLS, *supra* note 26, at 363-72.

131. MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 23 (1978). Presbyterians worried that Virginia's act incorporating the Episcopal Church would replace the Anglican church as the Commonwealth's established church. *See id.* at 24.

132. The disestablishment process began in 1776 when Virginia adopted a new constitution. Section 16 of its Declaration of Rights provided in part "[t]hat religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction . . . and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other." VA. DECLARATION OF RIGHTS § 16 (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 70. *See also* VA. CONST. art. I, § 16.

As I argued in the foregoing section, "[i]t would be a mistake . . . to interpret the establishment clause wholly in terms of what Madison and Jefferson thought." Paul G. Kauper, Everson v. Board of Education: *A Product of the Judicial Will*, 15 ARIZ. L. REV. 307, 318-19 (1973). It is also a mistake to suggest that the First Amendment's meaning is discernible from arguments made during Virginia's disestablishment process since such arguments were neither presented nor considered by the framers and ratifiers of the Establishment Clause. *See* John T. Valauri, *Constitutional Hermeneutics*, *in* THE INTERPRETIVE TURN: PHILOSOPHY, SCIENCE, CULTURE 245 (David R. Hiley et al., eds., 1991).

133. A general assessment normally is distributed equally to all Christian religions. *See* WINTHROP S. HUDSON, RELIGION IN AMERICA, 103 (3rd Ed. 1981).

134. MALBIN, *supra* note 131, at 24.

135. The reverential preamble of the Act acknowledged "Almighty God," the "Al-

(authored by Jefferson in somewhat different form in 1779).[136] In 1786, the State also repealed the act incorporating the Episcopal Church.[137] All legally significant vestiges of the established Episcopal (formerly Anglican) church were removed in 1802, when the Virginia General Assembly ordered the sale of its glebe lands. Officials were required to use the receipts from the land sale to pay parish debts, support the poor, and provide funds "for any other nonreligious purpose which a majority of the voters might decide."[138] The rhetoric inspiring Virginia's movement toward total disestablishment was adopted by the United States Supreme Court in 1947, but the Court ignored the eighteenth century state constitutions that continued to treat non-Protestants as second class citizens.

The New York Constitution of 1777 guaranteed "the free exercise and enjoyment of religious profession and worship, without discrimination or preference."[139] However, legal restrictions aimed at and adversely affecting Roman Catholics remained on the statute books until 1806.[140] The 1777 Constitution also discriminated against those with no religious beliefs to the extent that it decreed laws "as may be construed to establish or maintain *any particular denomination* of Christians or their ministers . . . are, abrogated and rejected."[141] Indeed, a state statute enacted in 1784 "took note of the duty of governments to 'countenance and encourage virtue and religion'."[142] Professor Curry explains, "New York inherited the common colonial ethos that America was a Protestant

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mighty power" and the "plan of the Holy author of our religion, who [is] Lord both of body and mind." *Act For Establishing Religious Freedom* (Virginia), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 84.

136. The wording of Jefferson's *Bill For Establishing Religious Freedom* began with the phrase, "[w]ell aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds, that Almighty God hath created the mind free, ..." *Id.* at 77. As enacted, the *Act For Establishing Religious Freedom* deleted this phrase; instead, the Act began with the phrase, "[W]hereas Almighty God hath created the mind free." *Id.* at 84. Thanks to Madison's skilful political leadership, the Act became law in January of 1786, upon the governor's approval. *An Act for Establishing Religious Freedom*, ch. 83, 12 VA. STATUTES AT LARGE 84 (William W. Hening ed., 1785).

137. MALBIN, *supra* note 131, at 25.

138. STOKES & PFEFFER, *supra* note 99, at 71.

139. N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 75.

140. STOKES & PFEFFER, *supra* note 99, at 73.

141. FEDERAL AND STATE CONSTITUTIONS, *supra* note 128, at 2636 (emphasis added). Accordingly, no longer could the counties of metropolitan New York support the Anglican church with taxes. *See* McConnell, *supra* note 130, at 1436.

142. CURRY, *supra* note 48, at 162 (quoting *New York Session Laws* 21 (New York, 1784)).

country and simply assumed that Protestantism should be encouraged."[143]

Connecticut made no excuses for its tax supported establishment of religion.[144] Its "preferential" establishment of Congregationalism,[145] with tax exemptions provided for Quakers and Baptists, endured until 1818.[146]

New Hampshire adhered to its religious establishment long after it ratified the first Amendment.[147] Its Constitution of 1784 encouraged "the public worship of the DEITY, and of public instruction in morality and religion."[148] It empowered,

> the legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this state, to make adequate provision at their own expense, for the support and maintenance of public protestant teachers of piety, religion and morality:
> Provided notwithstanding, That the several towns, parishes, bodies-corporate, or religious societies, shall at all times have the exclusive right of electing their own [Protestant religious] teachers, and . . . no person of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect, or denomination.[149]

New Hampshire's ecclesiastical system was not toppled until 1819.[150] The state's provisions preventing non-Protestants from serving in the state legislature were not removed until 1852.[151] Despite New Hampshire's laws respecting an establishment of religion, it promptly ratified the Establishment Clause.

Like New Hampshire's Constitution, Article III of the Constitution of Massachusetts of 1780[152] empowered the legislature to authorize towns

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143. CURRY, *supra* note 48, at 162.

144. CURRY, *supra* note 48, at 183. Connecticut's *Act for securing Rights of Conscience in Matters of Religion, to Christians of every Denomination (1784)* allowed persons who were not members of the established Congregationalists church to pay their taxes to their own church if they regularly attended its religious services. CURRY, *supra* note 48, at 180-81.

145. *See* LEVY, *supra* note 5, at 41.

146. *See* LEVY, *supra* note 106, at 198.

147. *See* STOKES & PFEFFER, *supra* note 99, at 81.

148. N.H. CONST. of 1784, pt. 1., art. 6, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 81.

149. N.H. CONST. of 1784, pt. 1., art. 6, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 81.

150. *See* CURRY, *supra* note 48, at 187-88.

151. *See* STOKES & PFEFFER, *supra* note 99, at 78.

152. John Adams was the principal author of this Massachusetts Constitution. *See* Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J. L. & HUMAN. 311, 325 (1992).

and parishes "to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily."[153] Although a Massachusetts taxpayer could in theory be forced to support only teachers of his own religious sect or denomination,[154] the tax system was discriminatory in practice.[155] In fact, unless the taxpayer actually received instruction from a teacher of his own sect,[156] the funds collected from his taxes were paid to religious teachers elected in each town or parish (virtually always Congregationalists).[157] Massachusetts did not completely terminate its system of tax supported religion until 1833.[158]

Vermont's Constitution of 1777, stated in part:

> Section XLI. [A]ll religious societies . . . that have or may be hereafter united and incorporated, for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they, in justice, ought to enjoy, under such regulations, as the General Assembly of this State shall direct.[159]

The belief in Vermont and elsewhere that the use of tax funds in support of religion is not necessarily an impermissible establishment of religion[160]

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153. MASS. CONST. of 1780, pt. 1, art. III, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 77-78.

154. *See* LEVY, *supra* note 106, at 197.

155. "[T]he Congregationalists were the chief beneficiaries of the establishment primarily because they were by far the most numerous and because they resorted to various tricks to fleece non-Congregationalists out of their share of religious taxes." Leonard W. Levy, *The Original Meaning of the Establishment Clause of the First Amendment, in* RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 43, 72 (James E. Wood, Jr. ed., 1985).

156. *See id.*

157. The "Congregationalist dominance of local elections was foreseen and intended." Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 912 (1986).

158. Levy, *supra* note 155, at 73.

159. VT. CONST. of 1777, ch. 1, § 3; ch. 2, § 41, *excerpted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 75.

160. Any claim that Vermont, New Hampshire, and Massachusetts did not have an established church makes sense only if it is compared to the Anglican establishment model in England where the Anglican bishops, although subordinate to the British monarchy, "exercise[d] spiritual *and* temporal powers — powers made the more fearful because no proper distinction between them was made." Edwin S. Gausted, *A Disestablished Society: Origins of the First Amendment*, 11 J. CHURCH & ST. 409, 414 (1969). For this reason, "[T]the Framers [of the Federal Constitution and the Bill of Rights] appeared united in the belief that a national church, patterned after the English model, posed the greatest threat to [religious] liberty." ADAMS & EMMERICH, *supra* note 99, at 45.

indicates that the meaning of the term "establishment" in late eighteenth century varied from state to state, from town to town, and to a great extent from person to person. The sometimes strong, sometimes weak support for religion in all state constitutions suggests that an establishment of religion was then, as now, a question of degree.[161]

Obviously, nothing similar to the line drawn by the modern Court between permissible and impermissible state establishments was prevalent when the Establishment Clause was ratified since "[t]he First Amendment originally functioned as a restraint [solely] on the federal government rather than on the States."[162] States with an established religion, like New Hampshire, would not have ratified the Establishment Clause if it had invalidated their constitutions. The ratifiers "intended to prevent the federal government from interfering with state religious establishments."[163] Once again, it is relevant to reiterate that Justice Black's dicta in *Everson v. Board of Education* went beyond the historical evidence[164] when he asserted that the Establishment Clause "means at least this: Neither a state nor the Federal Government . . . can pass laws which aid . . . all religions."[165] Indeed, when the Establishment Clause was ratified, many persons were viewed within their states as second class citizens because of their lack of religious commitment to established denominations.

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161. *See* Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF., 259, 263 (1989) (recognizing that establishment of religion is a matter of degree).

162. EDWARD M. GAFFNEY, JR. & PHILIP C. SORENSON, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS 48 (Howard R. Griffin ed., 1984). The founding generation "generally believed that civil authority in religious matters, to the extent it could be exercised, was a state function." ADAMS & EMMERICH, *supra* note 99, at 45.

163. Kruse, *supra* note 42, at 84. The records of the State Ratifying Conventions collected by Elliot "clearly show that the federal government's potential religious activity was the object of fear." Kruse, *supra* note 42, at 76 (referring to THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed., 1836)). The framers and ratifiers wanted to make sure that Congress could not "molest state religious programs." Kruse, *supra* note 42, at 85.

164. When Justice Black relied on Virginia's experience in his *Everson v. Board of Education* opinion, he "neglected to mention . . . that church-state arrangements in the original thirteen states were as diverse as the views of the Founders, with Virginia representing but one model on a spectrum that ranged from disestablishment through official state establishment, with various cooperative arrangements in between." Glendon & Yanes, *supra* note 42, at 483. Under Black's model, Congress may not give nondiscriminatory aid to religion, and "whatever Congress could not do, the states could not do either." MALBIN, *supra* note 131, at 2. Justice Black did not cite the legislative history of the Establishment Clause as it underwent scrutiny by the First Congress.

165. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

In the following section, I describe the relevant responses by members of the First Congress after Madison proposed a Bill of Rights. Admittedly, the hermeneutical problems presented by the recorded debates range from the "paradoxical to [the] impenetrable,"[166] but one generalization can be made safely: The framers of the First Amendment (namely the First Congress) and the ratifiers (the state legislatures responding favorably to the First Congress' recommendation) did not intend to subvert any of the existing state constitutions which established religion.

III. The First Congress Restricts Itself but Not The States

A. The State Ratifying Conventions Express Their Concerns About Centralized Control over Religion

The United States Constitution would not have been ratified if it had endorsed a religion or a religious doctrine. This situation was well understood by delegates attending the Philadelphia Convention during the Summer of 1787. Accordingly, in none of the Constitution's substantive provisions are there professions of faith, sentiments of thanksgiving to a deity, or religious commitments. "The United States was not to be a 'confessing' state."[167] Of course, the Constitution does not repudiate the nation's Christian heritage.[168] The new nation and its new Constitution "were not perceived to be inimical to the Christian Church or Christian beliefs."[169]

Religion was still considered by many of the Founders to be "the strongest promoter of virtue, the most important ally of a well-constituted republic."[170] Unfortunately, many religious Americans were openly hostile

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166. Curry, *supra* note 48, at 193.

167. Miller, *supra* note 8, at 107.

168. "The vast majority of Americans assumed that theirs was a Christian, i.e. Protestant, country and they automatically expected that the government would uphold the commonly agreed on Protestant ethos and morality." Curry, *supra* note 48, at 219. It was hard in the 1780s and 1790s "to define where Protestantism ended and secular life began." Curry, *supra* note 48, at 218.

169. Miller, *supra* note 8, at 115. In a New York case decided in 1811, Chancellor James Kent upheld a conviction for blasphemy on the ground that "we are a Christian people, and the morality of this country is deeply ingrafted upon Christianity." People v. Ruggles, 8 Johns. 290, 295 (N.Y. Sup. Ct. 1811). Joseph Story's *Commentaries* note that, when the First Amendment was adopted, "the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the Freedom of religious worship." 3 Joseph Story, Commentaries on the Constitution of the United States § 1868 (1833).

170. Gordon S. Wood, The Creation of the American Republic, 1776-1787 427 (1969).

to non-Protestant faiths.[171] Protestant sects continued to be selectively privileged in many state constitutions.[172] Professor Laycock summarizes the situation as follows:

> State aid [to religion] was both preferential and coercive. The states continued practices that no one would defend today. All but two states had religious qualifications for holding public office, and at least five states denied full civil rights to Catholics. Blasphemy was commonly a crime; in Vermont blasphemy against the Trinity was a capital offense, although it presumably was not enforced as such. Observance of the Christian Sabbath was widely enforced [as such] with little in the way of fictitious [secular] explanations about a neutrally selected day for families to be together.[173]

Accordingly, the Framers understood that a national establishment or disestablishment of religion(s) would be undesirable, unpopular, and unachievable. Even so, outspoken opponents of ratification feared that the federal branches of government would "alter, abrogate, or infringe . . . part[s] of the constitution of the several states which provide for the preservation of liberty in matters of religion."[174] There was also fear that the new consolidated, central government could not be sensitive to local establishments of religion.[175] Anti-federalists[176] along with other groups and individuals[177] who lacked "confidence in the federal legis-

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171. *See* Laycock, *supra* note 157, at 918.

172. "[A]lmost no one thought that government support of Protestantism was inconsistent with religious liberty because. . . . [p]rotestantism ran so deep among such overwhelming numbers of people." Laycock, *supra* note 157, at 918.

173. Laycock, *supra* note 157, at 916-17.

174. THE CASE AGAINST THE CONSTITUTION: FROM ANTIFEDERALISTS TO THE PRESENT 76 (John F. Manley & Kenneth M. Dolbeare eds., 1987).

175. *See* Conkle, *supra* note 42, 1135.

176. Antifederalists generally deplored the Constitution's potential to subvert their state laws and customs. *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALIST WERE FOR 7 (Murray Dry ed., 1981). They wanted the states to be the primary units of government. They opposed strengthening the federal or general authority in ways that would undermine the states and endanger if not destroy local habits and attachments. *See id.* at 9-10. Many Federalists were also protective of their state constitutions establishing religion. For example, John Adams, a Federalist, drafted most of the Massachusetts Constitution of 1780. Berman, *supra* note 152, at 326. He would have opposed any attempt by the central government to abrogate its provisions establishing a religion. The arch-Federalist Joseph Story also made it clear that he was in favor of state autonony with respect to religious establishments. STORY, *supra* note 169 § 1873.

177. For a description of the odd coalition opposing the Constitution's ratification, see JACKSON T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788 259-62 (1961). The ratification debates split many religious sects. For example, some Baptists supported ratification; others did not. *Id.* at 260-61.

lature's ability to truly represent the people''[178] made their views known in state ratifying conventions.

Ratifying conventions in several states recommended more than 200 proposed changes to the Constitution.[179] Five states—their delegates worried about the federal government's potential jurisdiction over religious establishments—formally requested amendments limiting the national government's power to enact laws endangering rights of conscience and religious liberties.[180] New Hampshire, for example, proposed an amendment which read as follows: ''Congress shall make no laws touching religion, or to infringe the rights of conscience.''[181] This wording, considered in light of relevant local concerns, indicates that New Hampshire's ratifying convention did not want Congress to establish any religion other than the Protestant denominations endorsed by its state constitution. Although the wording of the Establishment Clause was not the same as the language proposed by New Hampshire's ratifying convention, its state legislature was satisfied that its system of financial support for elected Protestant teachers of piety, religion and morality was secure and for that reason it ratified the First Amendment.[182]

During the North Carolina Ratification Convention, Richard Spaight said, ''[a]s to the subject of religion. . . . [a]ny act of Congress . . . would be a usurpation.''[183] Mindful that North Carolina restricted the holding of state office to Protestants,[184] James Iredell insisted that the United States Congress lacks ''authority to interfere in the establishment of any religion whatsoever''; it has no ''power . . . in matters of

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178. Amar, *supra* note 42, at 1140.

179. MILLER, *supra* note 8, at 252.

180. *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 226 (1990). *See also* McGowan v. Maryland, 366 U.S. 420, 486 (1960) (Frankfurter, J., concurring). The five states were North Carolina, Virginia, New York, New Hampshire, and Rhode Island. States ratifying the Constitution without formal requests for an amendment prohibiting establishments of religion were Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Maryland, South Carolina, and Massachusetts. *See* JOINT COMM. ON PRINTING, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1009-24, H. DOC. NO. 398, 69th Cong., 1st Sess. (1927). Ten of the original 13 states sent in timely returns ratifying the First Amendment. *Id.* at 1065 n.2.

181. THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 163, at 326. This language, urged upon the House of Representatives by Mr. Livermore, was eventually rejected in favor of the language that is now the Establishment Clause. *See infra* notes 233-39 and accompanying text.

182. *See* CURRY, *supra* note 48, at 220.

183. 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 92.

184. N.C. CONST. of 1776, art. XXXII, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 71.

religion."[185] Speeches made during ratifying conventions in other states demonstrate the delegates' desires to have the subject of religion remain one "within the exclusive cognizance of the respective states." [186]

B. The First Congress and the Relevant Legislative History of the Establishment Clause

Turning now to the surviving legislative history made by the First Congress, Madison—elected to the House of Representatives after he promised the Virginia Convention that he personally would work for the adoption of amendments—proposed changes to the Constitution in early May of 1789.[187] Madison sifted through more than 200 amendments[188] that had been proposed by seven of the state ratifying conventions."[189] He condensed the list to a set of nine major proposals[190] which were debated in June, mainly because of his persistence.

Madison shrewdly managed to satisfy the diverging interests of the religious factions—the disestablishmentarians and the antifederalists. Justice Rutledge stated, however, that the debates of the First Congress considered together with Madison's efforts to disestablish religion in Virginia show that the Establishment Clause "forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises."[191] However, the debates of the First Congress disclose that "[t]he only thing we really *know* about the original meaning of the 'no establishment' clause is that it forbade Congress to disestablish as well as to establish religion."[192]

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185. 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 90. Madison, during the Virginia Ratifying Convention, makes a similar point: "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation." 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 88.

186. Snee, *supra* note 42, at 373-78.

187. On May 4, 1789, Madison moved to debate his list of proposed amendments to the Constitution, 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791 3 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) and announced that he would bring up the amendments on May 25. MILLER, *supra* note 8, at 251.

188. *See* CURRY, *supra* note 48, at 204 (citing Senator Pierce Butler of South Carolina). *See also* Theodore Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1406-07 (1966).

189. MILLER, *supra* note 8, at 252.

190. *See* 1 ANNALS OF CONG. 433-36 (Joseph Gales ed., 1789). *See also* ROBERT A. RUTLAND, JAMES MADISON: THE FOUNDING FATHER 62 (1987).

191. Everson v. Board of Educ., 330 U.S. 1, 41 (1947) (Rutledge J., dissenting). One wonders why Vermont and New Hampshire ratified the amendment that, according to Justice Rutledge, invalidated their system of appropriating money from public funds to aid religious ministries. *See infra* notes 233-38 and accompanying text.

192. KATZ, *supra* note 42, at 11.

For the better part of the day on June 8, 1789,[193] Madison spoke in favor of the nine proposals that he presented to the House. Some of the proposals were in the nature of a "bill of rights,"[194] others were introduced as changes to the body of the Constitution. More specifically, Madison favored amendments to Articles I, III, and VI of the Constitution. He also wanted to add a new Article between Articles VI and VII.[195] His proposed amendment prohibiting Congress from establishing any national religion was intended by him to be placed—and this is significant—in Article I, Section Nine.[196] His proposed amendment protecting "equal rights of conscience" against state action (the "Lost Amendment") was intended to be placed in Article I, Section Ten.[197] The limited reach of the original version of the Establishment Clause is indicated by its proposed placement in Article I, Section Nine (which limits federal power) rather than in Article I, Section Ten (which limits the states' powers).[198]

Madison's "Lost Amendment" stated: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[199] Unsuccessfully, Madison argued that "State Governments are as liable to attack these invaluable privileges as the General Government."[200] He described his Lost Amendment as "the most valuable amendment in the whole list."[201] Subsequently reworded, the Lost Amendment became Article XIV in a list of proposed amendments sent to the Senate,[202] where it was killed on September 7, 1789.[203] To Madison's dismay, the Lost Amendment could not be resurrected in the conference committee composed of Senate and House members. Although other proposals favored by Madison were not adopted by

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193. RUTLAND, *supra* note 190, at 63.

194. 1 ANNALS OF CONG. 436 (Joseph Gales ed., 1789).

195. *Id.* at 435-36.

196. *Id.* at 434.

197. *Id.* at 435.

198. All the substantive provisions in Section Ten of Article I limit state power. *See* U.S. CONST. art. I, § 10. On or about August 21, 1789, perhaps even earlier, the idea of incorporating the proposed establishment clause into the body of the original Constitution was dropped after the House Committee of the Whole abided by the Report of the House Select Committee that recommended seventeen articles of amendment in the nature of a bill of rights. *See* 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 59, at 158-62; RUTLAND, *supra* note 190, at 68.

199. 1 ANNALS OF CONG., *supra* note 190, at 435; *see also* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 187, at 11.

200. 1 ANNALS OF CONG., *supra* note 190, at 441.

201. 1 ANNALS OF CONG., *supra* note 190, at 755.

202. 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, 138 (Linda Grant DePauw ed., 1972). The Senate rejected Article XIV. *See id.* at 158.

203. *See* MILLER, *supra* note 8, at 255.

Congress,[204] the defeat of the Lost Amendment "was the change he felt most keenly."[205] Evidently, Madison's unacceptable "Lost Amendment" was considered an unwanted invasion of the states' powers, whereas the proposal (which became the Establishment Clause) *protected* the states' authority and traditional prerogatives.

Madison's first draft of the proposal, which eventually became the Establishment Clause, states: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner . . . infringed."[206] Madison's original proposal leaves state establishments of religion intact. The proposal was sent to a Select Committee of the House (sometimes called the Committee of Eleven),[207] whose report was issued on July 28.[208] Without explanation, Madison's draft was changed to read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."[209]

A revealing discussion in the House on August 15, provides persuasive evidence that the Establishment Clause was never intended to prohibit state action. The first speaker, Peter Sylvester from New York, voiced his concern about the House Select Committee's revision of Madison's

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204. Madison also failed to persuade the Congress to adopt his submission of the proposal that became the Second Amendment. His submission read: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; *but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.*" 1 ANNALS OF CONGRESS, *supra* note 190, at 434 (emphasis added). The italicized portion of this proposal was deleted by the Senate. MILLER, *supra* note 8, at 254-56. The Senate's deletion is consistent with the idea of powers reserved to the states and the people.

205. MILLER, *supra* note 8, at 255. Madison was ahead of his time. "The protection of liberties against the states (and all subordinate units) by the federal bill of rights had to wait until after the Civil War." *Id.*

206. 1 ANNALS OF CONG., *supra* note 190, at 434; 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 187, at 10. This wording provides ammunition to accommodationists who argue that this formulation containing the words "national religion" indicates that Madison was willing to settle for an arrangement that would not ban noncoercive, nonpreferential, impartial aids to religion. Even if this is incorrect, the point that should be considered is not what Madison wanted, but whether the Court can make good on its claim that its interpretation of the Establishment Clause is supported by history.

207. *See, e.g.*, STOKES & PFEFFER, *supra* note 99, at 94. The Committee was appointed on July 21. Its members included Madison and one member from the other ten states (in addition to Virginia) that were represented in the House. *Id.*

208. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 187, at 4.

209. 1 ANNALS OF CONG., *supra* note 190, at 729. Madison did not always get his way, although the Court's mythmaking efforts do not emphasize this point.

first draft.[210] He argued that the new language had a tendency "to abolish religion altogether."[211] Sylvester's objection made sense to his constituents who would have been appalled if any constitutional amendment nullified New York's state Constitution discriminating against non-believers and Roman Catholics [212] or invalidated its statute "[taking] note of the duty of governments to 'countenance and encourage virtue and religion'."[213]

Elbridge Gerry suggested that the proposed Establishment Clause "would read better if it was [reworded to state] that no religious doctrine shall be established by law."[214] Gerry's proposed language allays Sylvester's concern and safeguards his own state's religious establishment. Roger Sherman, a strong supporter of the United States Constitution, originally resisted the demands for a Bill of Rights because the powers granted to Congress by the Constitution "extend only to matters respecting the common interests of the Union, and are specially defined, so that particular states retain their sovereignty in all other matters."[215] On August 15, 1789, Sherman reiterated his previously stated view that state constitutions were not in danger of being abrogated under the original Constitution *sans* amendments. Representative Daniel Carroll of Maryland, however, wanted to make sure that the proposed amendment dealing with establishments of religion allayed the fears voiced by established sects in several states who believe they "are not well secured under the present Constitution."[216] Carroll was mindful that Maryland's Constitution at the time secured the rights of Christian sects and only

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210. According to Justice Souter, the House rejected its Select Committee's revision of Madison's first draft, which "arguably ensured only that 'no religion' enjoyed an official preference over others." Lee v. Weisman, 112 S. Ct. 2649, 2669 (1992) (Souter J., concurring). He draws the inference that the House's rejection of the Select Committee's revision indicates the Framers' intention to ban all "nonpreferential aid to religion." *Id.* Justice Souter's analysis of the textual development of the Establishment Clause's revisions turns out to be a predicate for his adoption of the so-called "powerful argument supporting the Court's jurisprudence following *Everson*." *Id.* at 2668.

211. 1 ANNALS OF CONG., *supra* note 190, at 729.

212. *See supra* text accompanying note 139.

213. CURRY, *supra* note 48, at 162 (quoting *Hanover Presbytery Petition 1777, in* JAMES, DOCUMENTARY HISTORY 226 (1971)).

214. 1 ANNALS OF CONG., *supra* note 190, at 730.

215. *See Letter from the Hon. Roger Sherman and the Hon. Oliver Ellsworth, Esquires, Delegates From the State of Connecticut, in the Late Federal Convention to His Excellency, the Governor of the Same State, in* 1 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 163, at 491, 492.

216. Carroll said, in part, that "many sects have concurred in opinion that they are not well secured under the present Constitution." 1 ANNALS OF CONG., *supra* note 190, at 730.

Christian sects. Moreover, Maryland's state Constitution authorized a general tax for the support of Christian sects.[217]

Madison attempted to pacify Carroll. Madison also addressed the fears and concerns of Gerry, Sherman and Sylvester—all hailing from states with partial religious establishments. He explained that the language of the House Select Committee limits only the necessary and proper clause powers of Congress in accordance with the recommendations of several state ratifying conventions.[218] Moreover, in Madison's reassuring words, "Congress should not establish *a* religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[219]

The foregoing explanation by Madison of the Establishment Clause's function does not suggest that he was trying to impose on the nation Virginia's policy of disestablishment. Indeed, if Madison had chosen to impose Virginia's resolution of the general assessment tax issue upon other states, then he would have confirmed the fears of all those state ratifying convention delegates who were afraid of the central government's augmented powers.[220] Yet in *Lee v. Weisman*, Justice Souter remains wedded to Justice Black's tall stories. Dismissing in a footnote[221] Chief Justice Rehnquist's challenge (in *Wallace v. Jaffree*[222]) to the renditions of history by Justices Black and Rutledge, Justice Souter follows *Everson* and argues that nonpreferential state aid is prohibited *inter alia* on the basis of the debates in the First Congress, Madison's Remonstrance, his Detached Memoranda, and The Virginia Statute for Religious Freedom.[223]

But Madison did not cite his Remonstrance or the famous Virginia Statute when he replied to Congressman Huntington from Connecticut,

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217. *See supra* note 115.

218. 1 ANNALS OF CONG., *supra* note 190, at 730.

219. 1 ANNALS OF CONG., *supra* note 190, at 730 (emphasis added). Cord argues that Madison's reply indicates that the Establishment Clause is "addressed to the possible imposition of a *single church or religion* by the Federal Congress." CORD, *supra* note 41, at 10. This arguably is too much of a stretch. Yet, Justice Souter concedes that the placement of an indefinite article before the word "religion" is evidence that the Framers intended only to ban preferential establishments. *See* Lee v. Weisman, 112 S. Ct. 2649, 2669-70 n.2 (1992) (Souter J., concurring).

220. Indeed, Richard Spaight of North Carolina felt the important question was: "If the judiciary acts as a check on the legislature, then who was to act as a check upon the judiciary?" RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 8 (1971).

221. *Weisman*, 112 S. Ct. at 2670 n.3 (Souter, J., concurring).

222. 472 U.S. 38 (1985) (Rehnquist, C.J., dissenting).

223. *Weisman*, 112 S. Ct. at 2668-71 (Souter, J., concurring). It is foolishness if anyone thinks that Madison, who was playing the role of a dealmaker in August of 1789, planned diabolically to incorporate norms advocated in his Remonstrance into the First Amendment. If he had such intentions, they were frustrated when the Senate killed his "Lost Amendment." *See supra* text accompanying notes 199-205.

a state whose constitution provided for the financial support of Congregationalist clergy.[224] Huntington "wanted to keep the federal government from any pronouncement that might tend to affect Connecticut's Church-State system."[225] Huntington found the House Select Committee's wording defended by Madison "objectionable because it might be interpreted not merely to outlaw a congressional establishment of religion—a worthy and legitimate aim—but also to disable a federal court from enforcing a minister's claim against his parish."[226] Huntington did not want the enforcement of a Congregationalist's minister's claim "construed into a religious establishment."[227] He agreed with Sylvester from New York who feared for religion's survival[228] and he "hoped the amendment would . . . not . . . patronize those who professed no religion at all."[229] Madison's reassuring response to Huntington suggested that the proposed amendment merely responded to those delegates of state ratifying conventions who "feared" that religious factions who obtain control of the national government could "compel others to conform" to a national religion.[230] To prevent a nationalized religion, he suggested, once again, the insertion of the word "national" before the word "religion"[231] so that the proposed amendment would read: "No national religion shall be established by law, nor shall the equal rights of conscience be infringed." Madison's response to Huntington, in effect, assures him that Connecticut's establishment of religion is not jeopardized by the proposed amendment.

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224. *See supra* text accompanying notes 144-46.

225. CURRY, *supra* note 48, at 203.

226. HOWE, *supra* note 32, at 20-21. Like many others in the First Congress, "Huntington was anxious . . . to preserve the freedom of the states to enforce such principles relating to religion as they saw fit." *Id.* at 22. Huntington "was calling attention to the fact that the states, in many varying ways, did support and aid religious enterprise," and that it would be unfortunate if the federal courts were deprived "of power to respect state law when it happened to sustain a religious enterprise." *Id.* at 23.

227. 1 ANNALS OF CONG., *supra* note 190, at 730.

228. *See* Laycock, *supra* note 157, at 889. It should be noted that Justice Rutledge in *Everson* suggests incorrectly that religion was not supported financially by taxes. *See* Everson v. Board of Educ., 330 U.S. 1, 42-43 n.34. Towns in Connecticut, contrary to Justice Rutledge, were taxed for the support of their ministers. *See* CURRY, *supra* note 48, at 203. Moreover, Massachusetts, like the other states, had other laws respecting an establishment. For example, laws "for Making More Effectual Provision for the Due Observation of the Lord's Day." McGowan v. Maryland, 366 U.S. 420, 546 (appendix to opinion of Frankfurter, J., concurring). Because Massachusetts ratified the Establishment Clause, its approval suggests a meaning far different from the meaning attributed to it by the Supreme Court.

229. 1 ANNALS OF CONG., *supra* note 190, at 730-31.

230. 1 ANNALS OF CONG., *supra* note 190, at 731.

231. 1 ANNALS OF CONG., *supra* note 190, at 731.

Samuel Livermore was a Federalist from New Hampshire, a state whose laws supported religious ministries.[232] His motion to change the proposed Establishment Clause reads as follows: "Congress shall make no laws touching religion, or infringing the rights of conscience."[233] Livermore's language was briefly adopted by the House.[234] His choice of wording (the same as that proposed by New Hampshire's ratifying convention)[235] prevents Congress from disestablishing as well as establishing a religion. Livermore would have voted against (and New Hampshire would have rejected) any amendment nullifying a parish's tax for the support of elected Protestant teachers.[236] Although Justice Souter tells us that he does not know what the eventual congressional rejection of Livermore's language means,[237] New Hampshire's ratification of the Establishment Clause suggests that its state legislature was assured that its established religion was still protected from the central government.

Livermore's language was altered on August 21, to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe upon the rights of conscience."[238] Arguably, this proposal did not differ in substance from Livermore's, and Madison decided the alteration was acceptable.[239] The House's proposal was not favorably received by the Senate.

After a secret Senate debate[240] on September 9, the Senate's draft read: "Congress shall make no law establishing articles of faith or a

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232. *See supra* text accompanying note 149.

233. 1 ANNALS OF CONG., *supra* note 190, at 731. The language proposed by Livermore is similar to the amendment proposed by New Hampshire's ratifying convention. *See supra* note 181.

234. 1 ANNALS OF CONG., *supra* note 190, at 731.

235. Livermore was "wedded" to the language adopted by the New Hampshire ratifying convention. *See* CURRY, *supra* note 48, at 203.

236. One commentator notes that "freedom of religion to Livermore, as to so many other Federalists, seemed to be limited to Protestants, and only to particular kinds of Protestants." Morton Borden, *Federalists, Antifederalists, and Religious Freedom*, 21 J. CHURCH & ST. 469, 478 (1979).

237. Lee v. Weisman, 112 S. Ct. 2649, 2669 (1992) (Souter, J., concurring).

238. 1 ANNALS OF CONG., *supra* note 190, at 766-67, 773; *see also* 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 187, at 28 n.9; 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 59, at 159.

239. *See* CURRY, *supra* note 48, at 214.

240. On September 3, three motions changing the wording in the proposed religion amendments were defeated: First, "[Congress shall make no law establishing] *[o]ne* Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed." *Weisman*, 112 S. Ct. at 2669 (Souter, J., concurring) (quoting 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 202, at 151 (emphasis added). Second, "Congress shall not make any law infringing the rights of conscience or establishing

mode of worship, or prohibiting the free exercise of religion . . . ."[241] This provision, having a potential for congressional action terminating state religious establishments, was unacceptable to the House. A joint conference committee quickly ironed out the differences between the House and Senate versions of the Amendment, and their wording is now the First Amendment.[242]

Commenting on the joint conference committee's work following the Senate's action, Justice Souter in *Lee v. Weisman* generalizes much too broadly as follows: "The Framers . . . extended their prohibition to state support for religion in general" and rejected narrower language prohibiting only preferential establishments.[243] Notwithstanding Justice Souter's generalization, *state* establishments of religion were *not* prohibited by the Framers.

Nearly every scholar agrees that whatever the First Amendment means, originally it did not reach the states.[244] For example, Professor Kurland agrees that "the evidence of the nonapplicability of the [F]irst [A]mendment to the states is clear and convincing as far as the intent of the authors and ratifiers of the [F]irst [A]mendment is concerned."[245] The First Congress was wise and prudent enough to realize that state officials were better informed and more politically accountable than

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any Religious Sect or Society." Third, "Congress shall make no law establishing any *particular* denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 202, at 151 (emphasis added).

241. 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 202, at 166.

242. There is no documentation of the conference committee's discussions. After it reached an agreement, its report was published on the 24th of September. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 187, at 47-48. The language reported by the conference committee is the same as the religion provision of the First Amendment. *Id.*

243. Lee v. Weisman, 112 S. Ct. 2649, 2669-70 (Souter, J., concurring).

244. CORD, supra note 41, at 14; CURRY, *supra* note 48, at 215; EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 104, 104 n.5 (1957); LEVY, *supra* note 5, at 122; MALBIN, *supra* note 131, at 16 (The Establishment "[C]lause prohibited Congress from tampering with state religious establishments."); STORY, *supra* note 169, at 730-31; Amar, *supra* note 42, at 1157-60; Kruse, *supra* note 42, at 84-85, 127-30; Lietzau, *supra* note 42, at 1191; Paulsen, *supra* note 42, at 321-23; Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions,* 20 WAKE FOREST L. REV. 569, 619 (1984). *See also* Snee, *supra* note 42, at 388.

245. Kurland, *supra* note 53, at 844. In a similar vein, Wilbur Katz writes, "It seems undeniable that the First Amendment operated, and was intended to operate, to protect from Congressional interference the varying state policies of church establishment. The Amendment thus embodied a principle of federalism." KATZ, *supra* note 42, at 9.

federal officials. Moreover, Americans in 1789 largely believed that church-state issues should be settled in accordance with the preferences of local communities — preferences that varied dramatically in different areas of the nation. Nevertheless, liberal and moderate United States Supreme Court Justices continue to rely excessively on James Madison and the debates of the First Congress to reinforce the Court's view that each state should be subjected to the same limitations as Congress.

The United States Supreme Court distorts what Madison really accomplished in the First Congress. Madison was the moving force behind the Bill of Rights, a facilitator, a prodder, an editor, a diligent deal maker. He selected the amendments to be debated (and omitted the ones he did not want debated). His influence in pushing through the Bill of Rights cannot be gainsaid, even though there were some important alterations to his first draft which eventually became *the* Establishment Clause. However, neither his first draft nor the subsequent revisions by the First Congress threatened the antidisestablishmentarians in the several states (unlike the views expressed in Madison's Remonstrance, his Detached Memoranda, and Jefferson's views about walls of separation which did threaten the antidisestablishmentarians). Indeed, the Establishment Clause is part of our Constitution now only because Madison managed to satisfy the reservations of antidisestablishmentarians without impeding the disestablishment process ongoing in several states. Therefore, contrary to misleading impressions created by the Court since 1947, Madison's views, which he expressed during Virginia's disestablishment battles, are of limited relevance when the meaning of the Establishment Clause is debated. The Fourteenth Amendment is at least as relevant as the Establishment Clause. Nonetheless, the Court still leans on Madison's collected papers as a crutch to support its position that federal courts may enjoin non-stigmatizing state aid to religion.

To sum up the foregoing, the Founders in Philadelphia during the summer of 1787 agreed that the federal government lacked power to disestablish religions established by state law. Public opinion did not change when the First Amendment was framed in 1789 and ratified in 1791.[246] The Establishment Clause, as it was originally projected in 1791, did not encroach upon any of the unspecified residual powers reserved to the states.[247] Perhaps I have been belaboring the obvious. On its face

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246. Since no records were kept of the debates in the state legislatures that ratified the Bill of Rights, we do not know what the legislators of the various ratifying and nonratifying States said about the scope and reach of the Establishment Clause. Neither the relevant correspondence of public figures nor newspaper comments have "uncovered anything particularly revealing. . . ." LEVY, *supra* note 5, at 189.

247. Even Jefferson "understood the states' rights aspect of the original establishment

the Establishment Clause prevents congressional interference with laws in the states regulating religion and the language chosen by the First Congress performed that function until the 1940s.[248] The Court's incorporation doctrine has, however, transformed the Establishment Clause from a guarantee of state autonomy[249] to a provision limiting state powers.

IV. The Neglected Citizenship Declaration: A Bridge from the Establishment Clause to the Fourteenth Amendment's Prohibitions Against State Action

A. Identifying the Missing Link in the Court's Establishment Clause Chain of Reasoning

The Supreme Court's Establishment Clause jurisprudence is most vulnerable to criticism when state support of religion is enjoined at the behest of a litigant whose freedom is not violated. Nevertheless, the Court repeatedly reaffirms without reservations or qualifications the decision in *Everson v. Board of Education*,[250] which "ensconced separationism as an end in itself."[251] Unfortunately, the Court has never found a cogent way to connect the Establishment Clause to the three prohibitions in Section One of the Fourteenth Amendment.[252] This missing link[253] weakens the Court's Establishment Clause jurisprudence. In this

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clause." *See* Amar, *supra* note 42, at 1159. Moreover, when Jefferson was the Governor of Virginia, he endorsed theistic beliefs when it suited him. Indeed, "he was so enamored of the motto ['Rebellion to tyrants is obedience to God'] that he included it on the seal of Virginia and stamped it on the wax with which he sealed his own letters." Richard B. Morris, Seven Who Shaped Our Destiny: The Founding Fathers as Revolutionaries 137 (1973).

248. Glendon & Yanes, *supra* note 42, at 481-82 ("the historical record is clear that when the religious language was first adopted it was designed to restrain the federal government from interfering with the variety of state-church arrangements then in place").

249. *See* Amar, *supra* note 42, at 1136.

250. 330 U.S. 1 (1947). Perhaps the most controversial line in *Everson* is the one stating that "[n]either a state nor the Federal government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15.

251. Glendon & Yanes, *supra* note 42, at 535.

252. The three prohibitions read:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

253. The missing link referred to in the text is the introductory sentence of the Fourteenth Amendment which reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

section I will focus on the cases dealing with symbolic state support for religion, that is, support which does *not* violate anyone's religious liberty but which might subvert an individual's citizenship status.

In *County of Allegheny v. ACLU*,[254] the Court permanently enjoined a county from placing on the beautiful "Grand Staircase" of its courthouse a privately donated creche depicting the Christian nativity scene during the Christmas holiday season. *County of Allegheny* has a rationale that makes sense given the doctrine of paramount national citizenship embodied in the Fourteenth Amendment. Indeed, the Court's emphasis on the states' duty to protect persons who are stigmatized as outsiders by government endorsements of religion enables us to see the missing link connecting the Establishment Clause with the commands of the Fourteenth Amendment. However, this missing link was not noticed in *Everson*. I describe below the endorsement rationale ventilated in *County of Allegheny*, but let us first re-examine the incorporation doctrine "slipped" into the *Everson* opinion.

Everson explains that the Establishment Clause is incorporated by the Fourteenth Amendment because the Court had already incorporated the Free Exercise Clause into the Establishment Clause and because the Establishment Clause complements and is interrelated with the Free Exercise Clause.[255] But this justification of the Court's incorporation of the Establishment Clause does not explain why state laws not burdening free exercise, are invalid when challenged by a plaintiff who is offended by nonpreferential government aid to *all* charitable institutions, including religious ones.

Shortly after Justice Black's remarkably brief and unconvincing justification for incorporating the Establishment Clause in *Everson*, he wrote an extraordinary dissenting opinion attempting to justify incorporation of the first eight amendments *in toto*.[256] Justice Black's total incorporation theory has never attracted a majority of the Justices because his reconstruction of legislative history has been correctly deemed unconvincing. This is not to say that the framers of the Fourteenth Amendment did not want to incorporate *some* of the first eight amendments; they did. But any explanation that the Establishment Clause is incorporated because the Fourteenth Amendment's framers expressed collectively their objections to state aid to religion cannot be documented by substantial evidence. The Thirty-ninth Congress and the ratifying states did not, *pace* Justice Black, consciously constitutionalize a doctrine totally

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254. 492 U.S. 573 (1989).

255. Everson v. Board of Educ., 330 U.S. 1, 15.

256. *See* Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting) (involving the Fifth Amendment's guarantee against self-incrimination).

separating church and state in every town, hamlet, prison, public school, and state-subsidized orphanage.[257]

It is extremely awkward to incorporate the Establishment Clause[258] into the Fourteenth Amendment for reasons well expressed by Justice Black when he argued that the Ninth Amendment was not incorporated by the Fourteenth. As Justice Black pointed out, it is illogical to convert an amendment "enacted to protect state powers against federal invasion" into "a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs."[259] The same reasoning applies to the Establishment Clause. Furthermore, incorporating a "policy of states' rights for application against the states [is] utter nonsense" because "[i]t would be the incorporation of an empty set of values, akin to the incorporation of the [T]enth [A]mendment for application against the states."[260]

Although the Court has never embraced Justice Black's total incorporation theory, it selectively incorporates individual rights which are protected against state action by the Due Process Clause of the Fourteenth Amendment.[261] The process of selective incorporation involves a search for the principles of ordered liberty and justice that give content to the provisions of the Fourteenth Amendment.[262] One source for the content of such principles is "the traditions and conscience of our people."[263]

Some aspects of the Court's doctrine of separation of church and state are deeply rooted in the ideals and aspirations of our people, whereas other aspects of separationism are traditionally resisted by a large segment of the population. Separationism as an end in itself is incompatible with many traditional American values especially when the

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257. As Paulsen writes, "the Supreme Court forced a square historical peg into a round doctrinal hole by filing off a few of the more inconvenient sharp edges of history." Paulsen, *supra* note 42, at 317-18. There is less than a scintilla of evidence indicating that the Thirty-Ninth Congress intended to limit the state government's power to establish religion. Hardly sounding like a disestablishmentarian, Lyman Trumbull informed the Senate during the Thirty-ninth Congress' deliberations over the pending Civil Rights Bill: "Now, our *laws* are to be enacted with a view to educate, improve, enlighten, and *Christianize* the negro." CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (emphasis added).

For some recent histories of the Fourteenth Amendment, see generally EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

258. *See* Amar, *supra* note 42, at 1158.

259. Griswold v. Connecticut, 381 U.S. 479, 520 (Black, J., dissenting).

260. Conkle, *supra* note 42, at 1141.

261. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968).

262. *See id.* at 174-80 (Harlan, J., dissenting).

263. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

Court spells out the most extreme implications of a doctrine erecting a high and impregnable "wall of separation."[264]

Americans, however, traditionally boast that our land is a place of refuge for persons who feel they are dishonored in other countries because of their religion. Therefore, it violates enduring American traditions of justice if state supported religion "'sends a message to nonadherents [of the aided religion(s)] that they are outsiders, not full members of the political community'."[265] Under such circumstances, the Court labels the impermissible state action an "endorsement."

The endorsement rationale, which was adopted by the Court in *County of Allegheny*, recognizes that under some circumstances state aid to religion, even if it is not coercive or deliberately preferential, "mak[es] religion relevant, in reality or public perception, to *status* in the political community'."[266] Such "endorsements" violate the Establishment Clause regardless of whether they also violate the Equal Protection Clause[267] or the Free Exercise Clause.[268]

The Court's endorsement doctrine was foreshadowed in 1785 when Madison warned Virginians that an establishment of religion that departs

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264. Everson v. Board of Educ., 33O U.S. 1, 16 (1947) (quoting Reynolds v. United States 98 U.S. 145, 164 (1898)).

265. County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor., J., concurring)).

266. *Id.* at 626 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)) (emphasis added).

267. In Larsen v. Valente, 456 U.S. 228, 254 (1982), the Court explained: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. Justices Rehnquist and White point out, however, that the premise for the Court's holding in *Larsen* "is that the challenged provision [in the law] is a deliberate and explicit legislative preference for some religious denominations over others." *Id.* at 260 (White, J., dissenting). The *Larsen* Court's Equal Protection Clause test is not nearly as broad as the Court's Establishment Clause doctrine. Neither is Paulsen's. Paulsen advances an Equal Protection Clause test that triggers heightened judicial scrutiny only when "government policy has coercive or discriminatory effects on an individual's religious exercise." Paulsen, *supra* note 42, at 336. Certainly, the Equal Protection Clause's principles are pertinent in Establishment Clause cases, but they are bolstered and given more content by the citizenship declaration.

268. Even Justice Scalia concedes that legal coercion is not required when the government endorsement of religion is sectarian. *See* Lee v. Weisman, 112 S. Ct. 2649, 2683-84 (1992) (Scalia, J., dissenting). "To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy." *County of Allegheny*, 492 U.S at 628 (O'Connor, J., concurring). In Engel v. Vitale, 370 U.S. 421, 430 (1962), the Court's plurality opinion states: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion." *See also* Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222-23 (1963).

from the policy of offering asylum to the persecuted of every religion "degrades from the *equal rank of Citizens* . . . ."[269] There was, however, no well-developed conception of paramount national citizenship in 1785 and Madison's "Lost Amendment," which limited state power in order to protect rights of conscience, was killed in the Senate in 1789.[270] Given the Fourteenth Amendment's very first sentence, which replaced the older dual citizenship doctrine, paramount national citizenship is *the* mid-nineteenth century doctrine that makes, once again, Madison's concern about degraded citizenship relevant outside of Virginia.

Under the older, superceded doctrine of national citizenship, one could not be considered a citizen of the United States if he lacked "the full rights of a citizen in the State of his residence."[271] Under this view, United States citizenship is derived from state citizenship.[272] During this early period of our history, Madison's concern about degraded citizenship was inapplicable on a national level. During the 1830's, however, and increasingly thereafter, the abolitionists articulated a conception of paramount national citizenship[273] which was incompatible with state laws adversely affecting persons marginalized as if they were alien to the political community. The abolitionists, among others, were outraged when *Dred Scott v. Sandford*[274] upheld a doctrine of diminished citizenship reinforcing "deep and enduring marks of inferiority and degradation" on free blacks born in the United States.[275]

The doctrine of national citizenship was not yet the law in 1862 when the Attorney General of the United States was unable to clearly answer the question: Who is a citizen?[276] By 1866, however, the abolitionists' conception of paramount national citizenship was widely shared

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269. *Remonstrance*, par. 9, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 83.

270. *See supra* text accompanying note 203.

271. 1 Op. Att'y Gen. 506-9 (1821).

272. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 94 (1873) (Field, J., dissenting) (citing John C. Calhoun's 1833 speech in the Senate on the Force Bill).

273. *See generally* JACOBUS TENBROEK, Equal Under Law (Collier Books ed. 1965) (1951).

274. 60 U.S. (19 How.) 393 (1856).

275. *Id.* at 416.

276. Excerpts from an 1862 opinion of the Attorney General of the United States follows:

> Who is a citizen? What constitutes a citizen of the United States? I have often been pained by the fruitless search in our law books for a clear and satisfactory definition of the phrase *citizen of the United States* . . . . Eighty years of practical enjoyment of citizenship under the Constitution have not sufficed to teach us either the exact meaning of the words, or the constituent elements of the thing we prize so highly . . . .

10 Op. Att'y Gen. 383 (1862).

by the Republican dominated Congress and it became embodied in the introductory clause of the Fourteenth Amendment (hereinafter the citizenship declaration) which states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."[277] This language, deliberately chosen because of its breadth, secures the immunities, privileges, and liberties of the people as a body politic.[278] The citizenship declaration embodies a conception of citizenship broader than the widely shared concerns about the recurrence of badges and incidents of slavery. Indeed, it eliminates the stigma of second class citizenship.

Since social stigmatization because of creed is incompatible with an individual's equal citizenship status, the citizenship declaration can serve plausibly as a bridge historically,[279] functionally,[280] and hermeneutically[281] linking the Establishment Clause with all three overlapping prohibitions of state action in the Fourteenth Amendment. Realization of its potential was delayed when "in the *Slaughter-House Cases*,[282] the Court narrowly rejected the notion that there was independent substantive content in the amendment's citizenship provisions."[283] It was necessary and appropriate, however, for the Court to belatedly recognize "that the Fourteenth Amendment was designed to, and does, protect every citizen of this

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277. U.S. CONST. amend. XIV, § 1.

278. The most prominent writers on constitutional law during the post-Civil War period noticed that the Fourteenth Amendment's broad scope extended far beyond the need to protect persons of color. *See, e.g.*, HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937 96 (1991).

279. The framers and ratifiers of the Fourteenth Amendment gave very little thought, if any, to separation of church and state issues but the yearnings and aspirations embodied in the citizenship declaration enable the sensitive interpreter of the Constitution to "honor[] original intent and, yet, adapt[] it to contemporary issues." Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept Of A "Living Constitution,"* 139 U. PA. L. REV. 1319, 1330 (1991).

280. The framers of the Fourteenth Amendment "saw themselves as adopting *a* principle of equal citizenship, and that the principle was 'capable of growth'." Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 17 (1977) (quoting Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63 (1955)).

281. Charles Black has argued that much of the case law ascribed to the framers of the Fourteenth Amendment could be accomplished based solely on the citizenship declaration. CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 51-66 (1969). In other words, even without the Privileges and Immunities Clause, even without the Equal Protection Clause, and even without the Establishment Clause, the citizenship declaration has an independent potency. The citizenship declaration, however, also acts synergistically with the prohibitions of the Fourteenth Amendment.

282. 83 U.S. (16 Wall.) 36 (1873).

283. Karst, *supra* note 280, at 18.

Nation against a forcible destruction [by Congress] of his citizenship, whatever his creed. . . ."[284]

In sum, the citizenship declaration of the Fourteenth Amendment describes the eligibility requirements for United States citizenship and recognizes a legal status with concomitant privileges and immunities for all citizens.[285] The citizenship declaration constitutionalizes the abolitionists' doctrine of paramount national citizenship, and this Article is intended to demonstrate how it augments the reach and scope of the Establishment Clause.[286]

B. The Function of the Citizenship Declaration

In our nation, citizenship is a "fundamental right";[287] it is a legal status but one not like "a license that expires upon misbehavior."[288] Citizenship status in America, in theory, is without gradations; there is no intermediate class of persons between citizens and aliens.[289] There are not any second class citizens—again, at least not in theory. There are no separate estates of the realm as in Great Britain—Lords, clergy and people. "The essence of equal citizenship is the dignity of full membership in the society,"[290] a principle that "guards against degradation or the imposition of stigma."[291] The status of being a citizen of the United States differentiates a person legally from aliens,[292] foreigners, corporations, and other non-citizens.[293]

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284. Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

285. Justice Bradley wrote prophetically, "[i]t was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens . . . . [t]heir very citizenship conferred these privileges, if they not possess them before." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 119 (1873) (Bradley, J., dissenting).

286. *See Afroyim*, 387 U.S. at 284 n.42 (Harlan, J., dissenting).

287. Trop v. Dulles, 356 U.S. 86, 93 (1958). Dissenting in Perez v. Brownell, Chief Justice Warren called United States citizenship the American people's "most basic right." 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

288. *Trop*, 356 U.S. at 92.

289. The Constitution's identification of persons who are citizens necessarily gives them "full partnership in political society." MALTZ, *supra* note 257, at 4 (1990). According to Representative Bingham, addressing the House in 1866, citizenship makes every person born in the United States "a partner in the government of the country." CONG. GLOBE, *supra* note 257, at 1291 (speech in support of the Civil Rights Act of 1866).

290. Karst, *supra* note 280, at 5.

291. Karst, *supra* note 280, at 6.

292. The Justice Department insists that the First Amendment rights enjoyed by citizens are more extensive than those guaranteed to resident aliens. *See* Trial May Turn on Issue of Aliens' Rights, WALL ST. J., Aug. 14, 1992, at B8. The alien, however, has never had legal parity with the citizen. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (upholding deportation of alien who in 1939 had been a member of the Communist Party in Greece). An alien cannot stand for election to many public offices.

The problem of limits is inescapable when theorists identify a concept of equal citizenship as a source of basic rights.[294] There are limits to my conception of the citizenship declaration, which is not radical or transformative. In Establishment Clause cases, the citizenship declaration merely supplies a missing link in the Supreme Court's Establishment Clause jurisprudence; it is not the foundation for an entirely new edifice of privileges, immunities, and rights, although it does add content to the Equal Protection Clause and adds strength to existing immunities.[295] With a proper view of the citizenship declaration, however, it is no longer necessary to rely primarily on the Court's frequently criticized theory of selective incorporation in Establishment Clause cases when a litigant's citizenship status is wrongfully degraded on the basis of his or her faith or lack of religious beliefs.[296]

Respect for beliefs is the common denominator of the endorsement of religion cases like County of Allegheny and the "citizenship" cases providing a citizen with an immunity against Congress when laws alter citizenship status on the basis of creed.[297] Only the overbreadth of the Court's Establishment Clause jurisprudence is eliminated by recognizing the function of the citizenship declaration. The immunity associated with citizen status does *not* need to come into play when nonpreferential, noncoercive state aid to religion advances legitimate secular objectives and does not stigmatize members of religious outgroups. It needs to come into play if, and only if, noncoercive state aid to religion marginalizes citizens who do not share the creed of the aided religion.

For example, Art. 1, § 2, cl. 2, & § 3, cl. 3 of the Constitution, respectively, require that candidates for election to the House of Representatives and Senate be citizens. The Court still refuses to "'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship'." Foley v. Connelie, 435 U.S. 291, 295 (1978) (quoting Nyquist v. Mauclet, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting)).

293. Birthright citizenship was not extended to American Indians born on reservations until 1924 by an Act of Congress. Act of June 2, 1924, ch. 233, 68 Stat. 253 (1924).

294. A theory of judicial review without limits encourages excessive judicial activism.

295. An immunity disempowers the government from acting to deprive a person of his or her privileges, entitlements, right, liberties, or status as a citizen. *Cf.* JUDITH JARVIS THOMPSON, THE REALM OF RIGHTS, 59, 283 (1990). For example, Congress lacks power to divest persons of their citizenship absent their voluntary renunciation. *See* Afroyim v. Rusk, 387 U.S. 253 (1967). There is an obvious difference however between divestment of citizenship on the one hand and a stigma that makes one seem like a second class citizen. In the latter situation, there is a qualified immunity that can be overcome if the government shoulders a heavy burden of persuasion by presenting evidence and arguments justifying its stigmatizing action aiding religion. *See infra* text accompanying notes 312-15.

296. The Court protects citizenship status from alteration on the basis of "creed, color, or race." *Afroyim,* 387 U.S. at 268.

297. *Id.* at 268.

The supporters of the citizenship declaration "wanted to put citizenship beyond the power of any governmental unit to destroy."[298] United States citizenship "means something;"[299] it means that a person's status is protected as well as her liberty. Chief Justice Warren labelled citizenship "man's basic right for it is nothing less than the right to have rights."[300] Although countless governmental classifications treat dissimilarly situated citizens differently on the basis of traits relevant to legitimate governmental objectives, persons[301] (whose religious commitments are not endorsed by the majority or consensus view) may no longer be stigmatized as inferior by the government's aid to religion. The foregoing proposition is captured, as stated above, by the Court's endorsement rationale in *County of Allegheny*, but I have not yet answered one important question: Why was it necessary for the citizenship declaration to link the Establishment Clause with the three prohibitions on state action in the Fourteenth Amendment?

The answer to the foregoing question is this: The citizenship declaration became necessary because the states did not fulfill one of their original obligations. More specifically, national unity was one of the Founders' ideals that transcended religious differences and states were expected to respect the national citizenship of the individuals comprising the sovereign people of the United States. The states failed to advance the national goal of unity when they failed to adequately protect the citizenship status of many people who were marginalized because of their race or creed. Therefore, more protection by the national government was needed. It was provided via the citizenship declaration. Hence, the citizenship declaration is the bridge connecting the Establishment Clause with the three prohibitions on state action in the Fourteenth Amendment. In short, the citizenship declaration is both remedial and reconfiguring. It is reconfiguring because the nineteenth-century notion that the United States is a Christian nation is no longer an accurate description of our polity.

The citizenship declaration is especially pertinent when state aid to religion belittles non-Christians whose very identities are sustained by

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298. *Id.* at 263. The government may not "'abridge,' 'affect,' 'restrict the effect of,'[or] 'take . . . away' citizenship." *Id.* at 267 (quoting U.S. CONST. amend XIV).

299. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 114 (1873).

300. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting). Justice Douglas, dissenting in *Perez*, stated, "Citizenship, like freedom of . . . religion, occupies a preferred position in our written Constitution, because it is a grant absolute in terms." *Id.* at 84 (Douglas, J., dissenting).

301. Aliens would usually be protected against state action because of the Court's Equal Protection Clause cases protecting aliens and because state action is preempted by Congress' power to prescribe the conditions for an alien's lawful residence in the United States.

the knowledge that they can stand tall—even in a nation that has a strong Christian heritage. A communitarian approach, instead of a one dimensional focus on individual rights, supports the ideal of equal citizenship in an illuminating way.[302] "From the communitarian perspective, citizenship is seen as an organic relationship between the citizen and the state."[303] A citizen of course is a member of a community[304] and is constituted in part by his embeddedness in that community. To subvert that membership is to undermine not merely rights, but human dignity. One's conception of self includes one's sense of being an American citizen. This sense of being an American, according to Professor Dershowitz, is threatened when the government aids Christian denominations.[305]

The connection between a creche displayed at Christmas and the threat to Jews that Dershowitz describes is not immediately evident to everyone. For example, Justice Scalia has indicated that he lacks empathy with any person, Jew or Gentile, who is traumatized when government officials facilitate public prayer.[306] Minority groups are in trouble when judges lose their ability to place themselves in the shoes of those who depend upon their sensitivity as well as their good legal judgment. We know from reliable testimony that persons who object to religious rituals sponsored by the government "bec[o]me the objects of ridicule and anger" when others learn of their beliefs.[307] Under such circumstances, the government's aid to religion has the impermissible effect of "mak[ing] religion relevant, in reality or public perception, to status in the political community."[308]

Admittedly, it is difficult for many mainstream Americans, especially mainstream Christians, to empathize with persons with nonconforming

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302. *See* T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1494-98 (1986).

303. *Id.* at 1494.

304. The Court has recognized that "citizenship is . . . a relevant ground for determining membership in the political community." Cabell v. Chavez-Salido, 454 U.S. 432, 438 (1982).

305. DERSHOWITZ, *supra* note 74, at 336. *See also supra* note 105 and accompanying text.

306. Lee v. Weisman, 112 S. Ct. 2649, 2681-83, 2686 (1992).

307. Judy Gordon Lessin, who many years ago sued unsuccessfully in Richmond to ban an invocation and benediction at her high school graduation, remembers and writes: "[W]e believed in our cause enough to defend ourselves" by filing a lawsuit but "[w]hen our case made the front page of the TIMES-DISPATCH, we became the objects of ridicule and anger from some students and faculty." Judy G. Lessin, *Letter to the Editor*, RICH. TIMES-DISPATCH, July 11, 1992, at A9. In short, Ms. Lessin was made to feel like a second-class citizen.

308. County of Allegheny v. ACLU, 492 U.S. 573, 626 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)).

religious beliefs. They ask why members of nonconforming religions or sects cannot "go along to get along" without filing lawsuits. However, for some members of minority religions, the psychological peer pressure generated by government-sponsored religious rituals is traumatic. Peer acceptance and self-image, for some insecure, as well as some outer-directed, persons are closely related. When peer pressure is aided or supported by the government's endorsement of a religious ceremony, symbol or belief, a *reasonable* dissenter[309] might, under the circumstances, consider herself viewed as less than a full member of the national community.[310] Non-degradable, equal citizenship status, however, is that victim-dissenter's birthright under the Fourteenth Amendment's citizenship declaration.

When a state subverts the status of patriotic Americans whose citizenship status is an inseparable part of their identity and self-esteem, the invasive state action tears away an invaluable component of one's very being.[311] If this is how a typical (as opposed to hyper-sensitive) member of a minority religion responds to a city-sponsored religious symbol (for example, a nativity scene), the injury is not merely a subjective chill.[312] At the very least, a normal reaction of this sort is an Article III injury[313] deserving of standing to sue. Moreover, under *County of Allegheny*, a cause of action is stated and the government should have the burden of persuasion to show why compelling secular interests justify its sponsorship of religion.

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309. What matters is that given all the facts and circumstances of a case, the party who complains about the stigmatizing effects of state aid to religion is perceived as "a reasonable dissenter." *See Weisman,* 112 S. Ct. at 2658. Certainly not "every state action implicating religion is invalid if one or a few citizens find it offensive." *Id.* at 2661.

310. Some offensive government action is tolerable because "offense alone does not in every case show a violation" of the Constitution. *Id.*

311. *See* Aleinikoff, *supra* note 302, at 1495.

312. *See* Laird v. Tatum, 408 U.S. 1 (1972) (denying standing to sue because plaintiffs' injuries were labelled a "subjective chill"). The reasonable observer test is arguably adequate in most endorsement cases brought under the Establishment Clause. On the other hand, experience might show that the reasonable observer standard may not be sufficiently sensitive, if the plaintiffs are members of minority religions and the fact finder is not empathetic. Just as in racial harassment and sexual harassment cases, where some courts are applying a "reasonable black person" and a "reasonable women" test, so too in cases involving deeply offended religious persons, a reasonable dissenter's test might be needed. *See, e.g.*, Harris v. International Paper Co., 765 F. Supp. 1509, 1513, *vacated in part*, 765 F. Supp. 1529 (D. Me. 1991) (amendment only of injunction and order) (using, in racial harassment case, a reasonable black person standard); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (using reasonable woman standard in sexual harassment case); Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (using, in sexual harassment case, standard of reasonable person of the same sex in that position).

313. U.S. CONST. art. III, § 2.

I can, however, think of five compelling governmental interests that might, if substantially furthered, justify noncoercive, nonpreferential aid to religion. Such aid could be justified if it: (1) facilitates the free exercise of religion without hardship to others, (2) increases options for a parent subject to a compulsory education law in a school district where the public education provided does not meet the religious beliefs of a reasonable parent,[314] (3) is an essential part of a program of equal access to government property,[315] (4) is an accommodation deemed necessary to accord religious persons or entities the same treatment as others similarly situated,[316] or (5) is a precaution necessary to avoid the appearance of hostility or callous indifference toward religion(s).[317] In such situations, under the model of adjudication proposed in this Article, the government can often carry its exceedingly heavy burden of persuasion.

When courts realize that there is a framework of analysis that will neither dramatically overturn precedent nor detract from the Court's legitimacy, judges might turn away from the spurious history and rely instead on the bridging function of the citizenship declaration.

V. Conclusion

The Fourteenth Amendment's provisions have an "overlapping and duplicatory nature."[318] The Fourteenth Amendment does not, however, give judges a blank check to use the rhetoric of "establishment" as an excuse to eliminate all religious symbolism in the public square. Ironically, the Court de-emphasizes Madison's concern about the connection between religious autonomy and citizenship status.[319] Although Madison lost his battle to obtain an amendment limiting the states' power to degrade a person's equal citizenship status, the general idea of national citizenship has survived, and it delimits the powers of both the state and federal government. For example, no religious person can be singled out and given privileges or disabilities because of his or her religious faith or

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314. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

315. Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 248-53 (1990) (upholding Equal Access statute enacted by Congress making it unlawful for a public secondary school to deny equal access to students wishing to hold religious meetings).

316. Widmar v. Vincent, 454 U.S. 263 (1981) (invalidating university regulation denying religious groups equal access to university facilities used as a public form).

317. Lee v. Weisman, 112 S. Ct. 2649, 2661 (1991) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.").

318. *See* TenBroek, *supra* note 273, at 123. The Establishment Clause protects states rights; quite different is the protection of individual rights provided by the Fourteenth Amendment. Unfortunately, the Court often neither sees nor appreciates this basic difference.

319. *See supra* text accompanying note 269.

loyalties. Indeed religious faith and loyalties are irrelevant to the rights and duties of citizens.[320]

This Article does not reconstruct the mindsets of Madison or those who influenced the framing of the Fourteenth Amendment, but I have tried to tease out the hitherto unnoticed dormant meaning of the Amendment's citizenship declaration. One aspect of that meaning must be made clear: the concept of *national* citizenship increases the rights of individuals at the expense of state sovereignty.

Our generation, and future ones, have the responsibility to develop and clarify a doctrine of citizenship status that gives citizens of the United States the dignity, honor, and protection they are due. Part of what is due in establishment of religion cases is a legal environment that is caring and respectful of persons regardless of their creed or lack of religious commitment. To give each citizen the protection and dignity that is his or her entitlement, without denigrating the importance of the spiritual dimension in the lives of many Americans, the meaning of the Establishment Clause should not be contaminated by a radical secularism that poses dangers akin to those posed by any other ideology taken relentlessly to an extreme. Accordingly, the Court's Establishment Clause doctrine must respect the equal citizenship status of individuals who need the presence of religious symbolism in the public square without debasing the equal citizenship status of individuals who feel, quite often reasonably, threatened by such symbolism. To perform this delicate task with adequate sensitivity, the Court must decide the cases one at a time without dogmatic prejudgments that indiscriminately view all kinds of aid to religion as if all aid is, without exception, forbidden fruit.

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320. The term "citizenship" has had a variety of meanings in American history; it is a dynamic concept that cannot be discussed in a vacuum. *See* JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 3, 8 (1991). One danger of any theory privileging citizenship, of course, is that it marginalizes aliens, including permanent residents, but this danger was with us when the Bill of Rights was drafted since the Founders tended not to regard aliens as parties to the social contract, i.e., citizens. *See* Gerald L. Neuman, *Whose Constitution?* 100 YALE L.J. 909, 927-38 (1991). Nothing, in this Article, however, provides a basis for reducing the Court's level of careful scrutiny (in equal protection cases) of state classifications based on alienage. Therefore, aliens who are made to appear as outsiders because of their religious beliefs are not unprotected, but their protection depends on a representation-reinforcing rationale that is beyond the scope of this Article. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 148-49, 160-62 (1980).

The Illegitimacy of Trademark Incontestability

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INTRODUCTION

The concept of incontestability in American trademark law has caused great confusion ever since its adoption as part of United States trademark law in 1946. Commentators as well as courts typically have been uncertain about not only what incontestability means, but also its effect in trademark litigation.[1] Incontestability in American trademark law refers to the notion that after five years of use, and the satisfaction of certain procedural elements, a trademark registration owner's right to a registered mark becomes "incontestable." Incontestability is defined in the Lanham Act[2] as conclusive evidence of the registration's validity, the mark's validity, and the registrant's ownership of the mark.[3]

Since 1946, there has been only one United States Supreme Court decision that directly addressed and attempted to clarify incontestability: *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*[4] The effect of incontestability is, in fact, best demonstrated by the *Park 'N Fly* case. The plaintiff in that case owned the federal registration to the service mark PARK 'N FLY which it used in connection with long-term parking and shuttle services at several major American airports.[5] The defendant used the mark DOLLAR PARK AND FLY on identical services, but only in the Portland, Oregon region.

The owner of the PARK 'N FLY trademark registration sued the user of DOLLAR PARK AND FLY for trademark infringement. The Ninth Circuit reversed the lower court's grant of an injunction protecting

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1. *See* Prudential Ins. Co. of Am. v. Gibraltar Fin. Corp. of Calif., 694 F.2d 1150, 1153 n.2 (9th Cir. 1982). *See also infra* notes 163-76 and accompanying text.

2. 15 U.S.C. §§ 1051-1072, 1091-1096, 1111-1121, & 1123-1127 (1988) (commonly referred to as the Lanham Act).

3. *Id.* § 1115(b).

4. 469 U.S. 189 (1985).

5. Specifically, St. Louis, Cleveland, Houston, Boston, Memphis, and San Francisco. *Park 'N Fly*, 469 U.S. at 191.

the plaintiff, ruling that its mark was merely descriptive.[6] On appeal, the Supreme Court reversed and held that the defendant was statutorily barred from raising the descriptive nature of the plaintiff's trademark because the trademark registration had become "incontestable" pursuant to the Lanham Act.[7] If the trademark had not become incontestable, the defendant would have been allowed to challenge the validity of the mark and probably would have been successful in arguing that the mark only described the plaintiff's services and was, therefore, invalid.[8]

This notion of incontestability is jurisprudentially insupportable and should be abolished. First, the Lanham Act's primary, express purpose was to codify the existing common law of trademarks and not to create any new trademark rights. The incontestability provisions of the Lanham Act, however, created new rights never before recognized at common law. To that extent, the incontestability provisions are contrary to the express purpose of the statute and therefore insupportable.

Incontestability also attempts to make a trademark itself the subject of property ownership, another concept that the common law has rejected both before and after the passage of the Lanham Act. Trademark rights are traditionally defined at common law as the right to use a certain mark on certain goods and the right to exclude others from using similar marks on similar goods in a way that would be likely to confuse or deceive the public.[9] This is not the same as saying trademarks themselves are property. To the extent incontestability makes (or attempts to make) trademarks property, it is completely inconsistent with the common law of trademarks.

Because of this conceptual illegitimacy at its core, incontestability is applied in inconsistent, irregular, and sometimes completely contradictory ways by each circuit and even within each circuit. This confusion is likely to continue as courts struggle to reconcile and apply both the express language of the statute and hundreds of years of trademark common law which are, on the subject of incontestability, irreconcilable.

This Article is first a study of the rational basis for incontestability in American trademark law. The role of incontestability in the larger regime of American trademark law is established in order to understand incontestability as it fits within the history of the common law of

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6. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 718 F.2d 327 (9th Cir. 1983), *rev'd*, 469 U.S. 189 (1985).

7. 469 U.S. at 205.

8. *See* Suman Naresh, *Incontestability and Rights in Descriptive Trademarks*, 53 U. CHI. L. REV. 953 (1986), for the proposition that protecting descriptive but incontestable marks is ludicrous.

9. DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 5A (1992).

trademarks. This is fundamental in order to understand the significance of the thesis that incontestability is illegitimate. Next, acquisition of incontestability is presented in order to show how simple it is to attain incontestable status and to put in perspective the resulting advantages. This also demonstrates the fact that incontestability is a radical departure from the common law of trademarks. This Article concludes with an analysis of trademarks themselves as property. Because the concept of incontestability was adopted without reference to the common law, and because it attempts to create property rights in a trademark itself, this Article concludes that incontestability is jurisprudentially illegitimate and should be repealed.

I. Incontestability and Trademarks Under the Lanham Act

A. Trademark Primer[10]

Before any meaningful discussion can occur regarding incontestability, a groundwork must be laid to explain where incontestability fits into the more generalized body of law known as trademarks. Trademark jurisprudence has developed over centuries of time. During this history, there has been nothing even remotely similar to the present day notion of incontestability. Therefore, where the legislative history of the Lanham Act portrays the Act as a mere registration statute[11] codifying the common law of trademarks, it is misleading if not just plain wrong.

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10. *See generally* Louis Altman, Callmann Unfair Competition Trademarks and Monopolies (4th ed. 1981); Jerome Gilson, Trademark Protection and Practice (1974 & Cum. Supp. 1992); John F. Coverdale, *Trademarks and Generic Words: An Effect-on-Competition Test*, 51 U. Chi. L. Rev. 868 (1984).

11. Any mark is registrable on the Principal Register of the Patent and Trademark Office pursuant to the Lanham Act, unless it—

> (a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.
>
> (b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.
>
> (c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.
>
> (d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to

The use of a mark to identify the source of a product actually began at least 3500 years ago when potters made scratchings on the bottom of their creations to identify their source.[12] The first judicial recognition of trademarks came, however, in 1618 in *Southern v. How*,[13] when a Common Pleas Judge in England made an obscure reference to a mark used on cloth. There are various renditions of how the subject of trademarks arose in *Southern v. How*, because the reference is actually to a prior unreported case which denied trademark rights.[14] The notion

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cause mistake, or to deceive.

(e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, or (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive or deceptively misdescriptive of them, except as indications of regional origin may be registerable under section 1054 of this title, or (3) is primarily merely a surname.

(f) Except as expressly excluded in paragraphs [(a)-(d)] of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. The Commissioner may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.

15 U.S.C. § 1052 (1988).

12. *See generally* WILLIAM HENRY BROWNE, A TREATISE ON THE LAW OF TRADE-MARKS 1-14 (Boston, Little, Brown, and Company, 2d ed. 1885); EDWARD S. ROGERS, GOOD WILL, TRADE-MARKS AND UNFAIR TRADING 34-39 (1919) [hereinafter GOOD WILL]; Abraham S. Greenberg, *The Ancient Lineage of Trade-Marks*, 33 J. PAT. [& TRADEMARK] OFF. SOC'Y 876 (1951); Benjamin G. Paster, *Trademarks—Their Early History*, 59 TRADEMARK REP. 551 (1969); Edward S. Rogers, *Some Historical Matter Concerning Trade-Marks*, 9 MICH. L. REV. 29 (1910); Gerald Ruston, *On the Origin of Trademarks*, 45 TRADEMARK REP. 127 (1955). Browne traces the use of proprietary marks and trademarks back several millennia to China, India, Persia, Egypt, Rome, and Greece, among other cultures, as well as citing marks used during the time of the Old Testament. *Id.* at 8 (the blocks of stone used to build the temple of Solomon bore quarry marks so the "mechanics" could "prov[e] their claims to wages"), and at 10 (Abraham paid for the cave in which he buried Sarah with coins bearing a mark of authentication). "Seals and other emblems of ownership were coeval with the birth of traffic." *Id.* at 2. "Such emblems had their origin in a general ignorance of reading the combinations of cabalistic characters that we call writing." *Id.* at 3. He discusses proprietary marks such as seals, at 4-6, sign-boards, at 6-7, watermarks, at 7-8, quarry and pottery marks, at 8-9, currency, at 9-10, identifying marks on merchandise in general, at 10-12, and books, at 12-14. *See also* GILSON, *supra* note 10, § 1.01[1].

13. Popham 144, Eng. Rep. 1244, Trinity Term 15, Jac 1.

14. *See generally* FRANK I. SCHECHTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADEMARKS (1925); Kenneth R. Pierce, *The Trademark Law Revision Act: Origins of the Use Requirement and an Overview of the New Federal Trademark Law*, 64 FLA. BUS. J. 35 (May, 1990).

of protecting a commercially viable indication of source, therefore, had a rather dubious beginning,[15] but it soon became a well accepted judicial notion in England that a mark deserved protection at common law to indicate the source or origin of goods.[16]

The American concept of trademark law followed this English common law concept of trademarks.[17] The notion of trademark protection quickly caught on in courts within the United States.[18] It was not until 1871, however, that the United States Supreme Court decided a trademark case.[19] Since 1930, the Supreme Court has decided only five trademark cases where infringement or validity was directly at issue.[20] This disinterest

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15. *See also* Blanchard v. Hill, 2 Atkyns 484 (1742) (court refused to grant injunction against alleged infringer because such an injunction would have given the plaintiff a monopoly in sales of the relevant product, playing cards); Pierce, *supra* note 14.

16. In Sykes v. Sykes, 3 B. & C. 541 (1824), the court regarded trademark protection as well established and awarded an injunction to the plaintiff where the defendant had used the plaintiff's mark, SYKES PATENT, on inferior shot-belts and powder-flasks and passed them off as products of the plaintiff. Another case still relied upon today is Millington v. Fox, 3 Myl. & Cr. 338 (1838), where plaintiff sued in equity to enjoin use of his mark. The court, in awarding the injunction, stated that the plaintiff had a right to enforce title to its mark and that an injunction was appropriate even though there was no direct proof of defendant's intent to defraud and that the defendant may not have even known of the plaintiff's mark. The United States Supreme Court has adopted this case as controlling. *See* Saxlehner v. Siegel-Cooper Co., 179 U.S. 42 (1900). *See also* GILSON, *supra* note 10, § 1.01[1].

17. United States v. Steffens, 100 U.S. 82, 92 (1879) [hereinafter *Trade-Mark Cases*]; Patricia Kimball Fletcher, *Joint Registration of Trademarks and the Economic Value of a Trademark System*, 36 U. MIAMI L. REV. 297, 301-02 (1982); Pierce, *supra* note 14, at 36 (English common law adopted trademarks from regulations by medieval guilds designed to protect the public against deception).

18. GILSON, *supra* note 10, at § 1.01[2]. By 1870, there were 62 trademark cases decided in the United States, although 40 of them were in New York state courts. See ROGERS, GOOD WILL, *supra* note 12, at 48-49 for a breakdown of these cases by year. Rogers also stated that "[i]t has only been since about 1890 that the cases began to be at all numerous." *Id.* at 49. He suggested mass marketing may have been the cause for the surge in litigation. *Id.*

19. Canal Co. v. Clark, 80 U.S. 311 (1871) (holding that miners did not have exclusive rights to use LACKAWANNA COAL as the geographic descriptive source of their coal; newcomers could freely use LACKAWANNA COAL as long as it was true; LACKAWANNA COAL was no "peculiar property" of the plaintiff).

20. Two Pesos, Inc. v. Taco Cabana, Inc., 112 S. Ct. 2753 (1992) (protecting as trade dress the interior of a Mexican restaurant); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (finding the United States Olympic Committee had an exclusive right to use the mark OLYMPIC); Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985) (interpreting incontestability); Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844 (1982) (finding third party infringement); Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938) (finding, *inter alia*, infringement of plaintiff's mark, NU-ENAMEL; interpreting the Trade-Mark Act of 1920 in light of the 1905 Act). Several other cases involved trademarks but did not directly

by the Supreme Court is totally unjustified in light of the heavy case load of the circuit courts in adjudicating trademark cases.[21]

The first United States trademark legislation was proposed in 1791 by Thomas Jefferson.[22] Jefferson correctly saw that any such legislation must be grounded in the Commerce Clause of the Constitution.[23] Jefferson perceived that exclusive rights to use a trademark had potentially significant economic effects, that a trademark registration system would be useful in streamlining and equalizing access to those rights, "and

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confront infringement or validity. K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) (Kennedy, J.), and 485 U.S. 176 (1988) (Brennan, J.) (each opinion reaching a different conclusion concerning gray market goods and importation rights); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) (holding attorney's fees are not available under the Lanham Act); Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966) (holding that a denial of a motion for summary judgement, the motion seeking a permanent injunction and damages in a trademark infringement suit, related only to pretrial procedures, and not the merits, and therefore was not "interlocutory" and accordingly not appealable under 28 U.S.C. § 1292(a)(1)); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (finding that the plaintiff in a trademark infringement and breach of contract action is entitled to a jury trial, due to the legal nature of one of several requested remedies); Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203 (1942) (granting the victorious plaintiff profits and damages under the 1905 Act, despite the lack of direct economic competition; expressly declined to decide the merits of the infringement issue); Pecheur Lozenge Co. v. National Candy Co., 315 U.S. 666 (1942) (per curiam) (finding local law applies to a mark not registered under the Trade-Mark Act of 1905, but instead registered under the copyright law, apparently by mistake); Reconstruction Fin. Corp. v. J.G. Menihan Corp., 312 U.S. 81 (1941) (holding the Reconstruction Finance Corporation liable in a series of failed trademark infringement suits for costs and any additional allowance made by the court in equity). In the last decade, the Supreme Court has denied certiorari to three trademark cases, all with a dissent by Justice White and involving whether a district court's likelihood of confusion finding is reviewable under the "clearly erroneous" standard as a finding of fact, or under the de novo standard as a conclusion of law. Novak v. Mutual of Omaha Ins. Co., 488 U.S. 933 (1988) (cert. denied) (White, J., dissenting); Euroquilt, Inc. v. Scandia Down Corp., 475 U.S. 1147 (1986) (cert. denied) (White, J., dissenting); Elby's Big Boy of Steubenville, Inc. v. Frisch's Restaurants, Inc., 459 U.S. 916 (1982) (cert. denied) (White, J., dissenting).

21. *See, e.g.*, GILSON, *supra* note 10, § 1.01[2]. There were over 2,000 substantive trademark cases decided by the circuit and appellate courts in this same time period. Search of LEXIS, TRDMRK Library, FEDCTS File (October 1, 1992).

22. GOOD WILL, *supra* note 12, at 47-48; Beverly W. Pattishall, *The Constitutional Foundations of American Trademark Law*, 78 TRADEMARK REP. 456, 459 (1988) (citing to Am. State Papers 48). *See also* Pierce, *supra* note 14, at 37.

23. GOOD WILL, *supra* note 12, at 48, and Pattishall, *supra* note 22, at 459 (Jefferson limited any trademark law to "commerce with foreign nations, and among the several States, and with the Indian tribes," tracking the Commerce Clause verbatim). As will be seen later, Jefferson was way ahead of his time. It took the United States Congress about 110 years before it enacted a trademark protection statute grounded in the Commerce Clause.

that trademark infringers should be punished."[24] Although the 2nd Congress of the United States defeated Jefferson's proposed trademark law,[25] Jefferson's insights on the subject proved instrumental in the 1946 Act.

The first enacted federal trademark statute in the United States was the Act of 1870.[26] This statute was enacted primarily to implement treaties agreed upon several years earlier.[27] That is, it was international demand, not domestic demand, that led to the first trademark statute.

In 1868, the United States ratified a treaty with Russia.[28] In 1869, the United States ratified a treaty with Belgium[29] and a convention with France.[30] Each of these granted reciprocal rights in trademarks for citizens of each country. Pursuant to each of these agreements, in order for a Russian, Belgian, or French citizen to obtain trademark rights in the United States, such a person had to file a trademark registration with the United States government.[31] At the time, however, there was no federal trademark registration system and, therefore, it was actually impossible for anyone to take advantage of the new treaties. Consequently, there was much pressure on Congress to push forward the Act of 1870.

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24. GILSON, *supra* note 10, § 1.01[2]; Pierce, *supra* note 14, at 37 (quoting Jefferson as insisting that trademark protection would "contribute to fidelity in the execution of manufacturing" and pushing Congress to pass legislation that would "[permit] the owner of every manufactory to enter in the record of the court of the district wherein his manufactory is, the name with which he chooses to mark or designate his wares, and rendering it penal to others to put the same mark on any other wares.").

25. Pattishall, *supra* note 22, at 460; ROGERS, GOOD WILL, *supra* note 12, at 48 ("It is evident that there was not a sufficient demand at the time of Jefferson's report or for seventy-nine years afterwards for a law to put into effect his recommendations and it was not until 1905 that they were fully carried out."). New York was the first state to enact a trademark law ostensibly to prevent fraud in the use of false stamps and labels, but did not do so until 1845. *Id.*

26. Act of July 8, 1870, c. 230, 16 Stat. 198.

27. BROWNE, *supra* note 12, at 292. In fact, in the *Trade-Mark Cases*, the Attorney General for the United States argued that "[t]he purpose and the natural and reasonable effect of the acts are to protect the producer or the importer of foreign goods in his right of selling them in the United States, and thus carry out in good faith and enforce our treaty stipulations on the subject. The act is a regulation of foreign commerce." Trade-Mark Cases, 100 U.S. 82, 88 (1879).

28. Additional Article to the Treaty of Navigation and Commerce, January 27, 1868, U.S.-Russ., 16 Stat. 389.

29. Additional Article to the Treaty of Commerce and Navigation, July 30, 1869, U.S.-Belg., 16 Stat. 359.

30. Convention Concerning Trade Marks, April 16, 1869, U.S.-Fr., 16 Stat. 365.

31. For a discussion on the procedure foreign citizens were required to follow under the Trade Mark Act of 1881, the constitutional amended version of the Act of 1870, see BROWNE, *supra* note 12, at 293-94.

Perhaps because of Congress' continental perspective over the treaties at issue,[32] the Act of 1870 codified existing common law principles and created trademark rights based more on continental notions of trademark law than common law.[33] Most notably, the Act of 1870 allowed registration by any person who was entitled to the exclusive use of any lawful trademark or who *intended to adopt and use* any trademark for use within the United States.[34]

The Act of 1870 was soon struck down by the Supreme Court as unconstitutional. In the *Trade-Mark Cases*,[35] the Supreme Court confirmed that trademarks had always been protected by the common law.[36] To grant new substantive rights in trademark law, Congress would have to point to a specific provision of the Constitution upon which it based

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32. See BROWNE, *supra* note 12, concluding that "[t]he Act of 1870 afforded the means whereby American citizens might furnish evidence required in other countries, and foreigners might also avail themselves of protection guaranteed by treaties, conventions, &c. To this extent at least, it was an act to carry out the treaty stipulations . . . ." *Id.* at 292. Browne also determined that "[a]mong commercial nations, there is a growing tendency to a general recognition of the emblems of commerce known as trade-marks; for such recognition operates as a safeguard against fraud on their own communities. Hence . . . the liberal views entertained by the judicial courts of nearly all the enlightened countries." *Id.* at 297.

33. For a comparison of trademark law in common law countries and civil law countries at the time of the Lanham Act, see J.R. Wilson, *Trade-Marks and Laws in Foreign Countries*, 37 TRADEMARK REP. 107 (1947). The primary difference for purposes here of the two systems is that common law countries such as the United States and Britain base trademark rights on use rather than registration. *Id.* at 109. Civil law countries, including many in continental Europe and Latin America, confer trademark rights upon registration, without regard to immediate use. *Id.* at 113. See also Robert A. Christensen, *Trademark Incontestability—Time for the Next Step*, 18 STAN. L. REV. 1196, 1197 n.12 (1966), for the view that "[t]he impact of incontestability on litigation . . . controls the degree to which the American trademark system is registration- rather than use-oriented. Because some, but not all, of the defenses available to the infringer in a wholly use-oriented system are precluded and because the owner must wait five years for the protection conferred by registration, our present trademark system lies somewhere between the two possible extremes." For a discussion on the difference between civil law and common law systems generally, see R.H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 DUKE L.J. 1207 (1990); Walter F. Murphy, *The 19th John M. Tucker, Jr. Lecture in Civil Law: Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91 (1991); Roscoe Pound, *A Comparison of Systems of Law*, 10 U. PITT. L. REV. 271 (1948).

34. Act of July 8, 1870, ch. 230, § 77, 16 Stat. 198.

35. 100 U.S. 82 (1879). Another comment on the international aspect of the Act is the fact that two of the three cases heard together under the name "Trade-Mark Cases" involved American merchants charged with infringing French trademarks. *Id.* at 82-83. Both Steffens and Wittemann were charged with infringing the trademarks of French champagne producers, G.H. Mumm & Co. and Kunkleman & Co., respectively.

36. *Id.* at 92.

this authority.[37] Since the Patent and Copyright Clause of the Constitution[38] did not expressly include protection of trademarks, such authority would have to be found elsewhere. Trademarks, the court reasoned, do not "depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. [Trademarks are] simply founded on priority of appropriation."[39]

The next significant attempt at a federal trademark registration system came with the Act of 1905.[40] The Act of 1905, however, was not well conceived. Commentators have described the Act of 1905 as "a slovenly piece of legislation, characterized by awkward phraseology, bad grammar and involved sentences. Its draftsmen had a talent for obscurity amounting to genius."[41]

Interpretations of the Act of 1905 were influenced heavily by the *Trade-Mark Cases*. Subsequent cases generally concluded that Congress had no authority to regulate substantive trademark law, so the Act of 1905 entitled registration only of those trademark rights already recognized at common law.[42] This, of course, totally defeated the purpose

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37. *Id.* at 93.

38. U.S. CONST. art. I, § 8, cl. 8.

39. *Trade-Mark Cases*, 100 U.S. at 94. The Act of 1870 also contained an intent-to-use provision. The constitutional legitimacy of the intent-to-use portion of the Act was not clearly determined; the Supreme Court found the Act unconstitutional because it was not based on the Commerce Clause. In 1988, Congress amended the Lanham Act to include an intent-to-use provision where trademark holders could register their marks for three years if they had a bona fide intention to use the marks. 15 U.S.C. § 1051(b). Because use of the mark is not required and, therefore, there is no actual interstate commerce, the intent-to-use provisions should fail constitutional review based on the commerce clause as in the *Trade-Mark Cases*. However, several commentators have argued that the current intent-to-use provisions are constitutional because they are part of the "flow of commerce" notion and the Supreme Court shows great deference toward congressional power with regard to Commerce Clause issues. *See* Charles James Vinicombe, *The Constitutionality of an Intent to Use Amendment to the Lanham Act*, 78 TRADEMARK REP. 361, 369-73 (1988). *See generally* Frank Hellwig, *The Trademark Law Revision Act of 1988: The 100th Congress Leaves Its Mark*, 79 TRADEMARK REP. 287 (1989).

40. Act of February 20, 1905, ch. 592, 33 Stat. 724. This Act allowed registration of marks used in interstate commerce for a period of 20 years with an unlimited right of renewal. Registration constituted prima facie evidence of ownership of the mark, accorded the owner federal jurisdiction, and provided certain remedies for infringement.

41. Edward S. Rogers, *The Expensive Futility of the United States Trade-Mark Statute*, 12 MICH. L. REV. 660, 665 (1914).

42. *See, e.g.*, American Trading Co. v. H.E. Heacock Co., 285 U.S. 247 (1932) (court gives priority over subsequent trademark registration in the Philippines because Congress has express authority to create trademark rights there and not in the United States); American Steel Foundries v. Robertson, 269 U.S. 372 (1926); United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 99 (1918) ("registration of the [petitioner's] trade-mark under . . . the act of Congress [did not have] the effect of enlarging the rights

of national legislation: to create one unified system of registration and enforcement of trademark rights.

After various amendments to the Act of 1905 failed to cure its ills,[43] the entire Act was thrown out in favor of a new statute crafted and pushed to passage largely by Representative Fritz G. Lanham. The Lanham Act was first introduced in 1938 but was not actually passed until 1946 and did not become effective until 1947.

Today, under the Lanham Act, trademarks are defined as any "word, name, symbol, or device, or any combination thereof . . . used . . . to indicate the source of the goods . . . ."[44] Trademarks are generally categorized into one of four groups: generic, descriptive, suggestive, and arbitrary or fanciful.[45] The strongest mark is an arbitrary or fanciful

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of [petitioner] beyond what they would be under common-law principles."). *But, c.f.*, Philco Corp. v. Phillips Mfg. Co., 133 F.2d 663, 668 (7th Cir. 1943) (Congress had the authority to create substantive trademark rights and did so in the Act of 1905).

43. In 1946, the Act of 1905 had forty-one sections. Of those, a total of 24 sections had been modified or added since the Act was passed. A review of the final, 1946 version shows these amendments were:

Act of May 4, 1906, ch. 2081, §§ 1, 2, 3, 34 Stat. 168.
Act of Mar. 2, 1907, ch. 2573, §§ 1, 2, 2(b), 34 Stat. 1251.
Act of Feb. 18, 1909, ch. 144, 35 Stat. 627.
Act of Feb. 18, 1911, ch. 113, 36 Stat. 918.
Act of Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167 (circuit court jurisdiction generally).
Act of Aug. 24, 1912, ch. 370, § 5, 37 Stat. 498.
Act of Jan. 8, 1913, ch. 7, 37 Stat. 649.
Act of Mar. 19, 1920, ch. 104, §§ 1-9, 41 Stat. 535 (implementing the Buenos Aires convention of Aug. 20, 1910, among other purposes).
Act of June 7, 1924, ch. 341, 43 Stat. 647.
Act of Mar. 4, 1925, ch. 535, §§ 1, 3, 43 Stat. 1268.
Act of Mar. 2, 1929, ch. 488, 45 Stat. 1475 (granting jurisdiction to the Circuit Court of Patent Appeals).
Act of April 11, 1930, ch. 132, § 4, 46 Stat. 155.
Act of June 7, 1934, ch. 426, 48 Stat. 926 (concerning the jurisdiction of the D.C. Circuit Court).
Act of June 20, 1936, ch. 617, 49 Stat. 1539.
Act of June 25, 1936, ch. 804, 49 Stat. 1921 (concerning the jurisdiction of the D.C. Circuit Court).
Act of June 10, 1938, ch. 332, 52 Stat. 638 (providing for the protection of collective marks).

See Beverly W. Pattishall, *The Lanham Trademark Act—Its Impact Over Four Decades*, 76 TRADEMARK REP. 193, 195, n.16 (1986).

44. 15 U.S.C. § 1127 (1988). *See* Towers v. Advent Software, Inc., 913 F.2d 942, 945 (Fed. Cir. 1990); Hughes v. Design Look, Inc., 693 F. Supp. 1500, 1505 (S.D.N.Y. 1988).

45. *See generally* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9-11 (2d Cir. 1976).

one[46] such as KODAK[47] or EXXON.[48] The weakest mark is a generic mark[49] such as CELLOPHANE[50] or ASPIRIN.[51] All marks are said to fit somewhere on this continuum,[52] although some courts have recognized the fact that there are no clear lines separating these categories.[53] The assignment of a specific trademark to these categories is not necessarily static. A mark can conceivably move from one category to another based on how the mark is used by the owner and the degree of consumer recognition developed in the mark.

Generic marks are words that refer to the specific genus of which the particular product is a species.[54] In other words, generic marks are terms for which there is no other descriptive word in the English language. A mark is said to become generic when it ceases to denote source and starts denoting the product itself.[55] Famous examples of marks that have

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46. Clipper Cruise Line, Inc. v. Star Clippers, Inc., 952 F.2d 1046 (8th Cir. 1992); Cellular Sales, Inc. v. MacKay, 942 F.2d 483 (8th Cir. 1991); General Mills, Inc. v. Kellogg Co., 824 F.2d 622 (8th Cir. 1987).

47. Eastman Kodak Co. v. Weil, 243 N.Y.S. 319 (N.Y. Sup. Ct. 1930).

48. Exxon Corp. v. Xoil Energy Resources, Inc., 552 F. Supp. 1008, 1014 (S.D.N.Y. 1981).

49. Dranoff-Perlstein Assoc. v. Sklar, 967 F.2d 852, 855 (3d Cir. 1992) (finding "if we hold a designation generic, it is never protectable") (In fact, a generic mark would not have trademark status at all); Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316 (9th Cir. 1982); Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

50. DuPont Cellophane Co., Inc. v. Waxed Products Co., 85 F.2d 75, 82 (2d Cir.), *cert. denied*, 299 U.S. 601 (1936).

51. Bayer Co. v. United Drug Co., 272 F. Supp. 505, 509 (S.D.N.Y. 1921).

52. Perini Corp. v. Perini Construction, Inc., 915 F.2d 121, 124 (4th Cir. 1990) (citing Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976)); Induct-O-Matic Corp. v. Inductotherm Corp., 747 F.2d 358, 362 (6th Cir. 1984) (citing Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75, 79 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978)).

53. Union Nat'l Bank of Texas, Laredo v. Union Nat'l Bank of Texas, Austin, 909 F.2d 839, 846 (5th Cir. 1990) (" 'Although meant as pigeon-holes, these useful labels are instead central tones in a spectrum; they tend to merge at their edges and are frequently difficult to apply.' " (quoting Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1183 (5th Cir. 1980))); Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75, 79 (7th Cir. 1977) ("As the ease with which hues in the solar spectrum may be classified on the basis of perception will depend upon where they fall in that spectrum, so it is with a term on the trademark spectrum"), *cert. denied*, 434 U.S. 1025 (1978)); *See also In re* Merrill Lynch, Pierce, Fenner, & Smith, Inc., 828 F.2d 1567, 1569 (Fed. Cir. 1987); Blinded Veterans Ass'n v. Blinded Am. Veterans Found., 872 F.2d 1035, 1039 (D.C. Cir. 1989).

54. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985); Clipper Cruise Line, Inc. v. Star Clippers, Inc., 952 F.2d 1046, 1047 (8th Cir. 1992); *Union Nat'l Bank, Laredo*, 909 F.2d at 845 ("A generic term is one which identifies a genus or class of things or services, of which the particular item in question is merely a member."); Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976).

55. *Miller Brewing Co.*, 561 F.2d at 75.

been held to be generic include LITE for use on beer,[56] and SHREDDED WHEAT for use on cereal.[57] Generic marks are not registrable.[58] Marks that become generic may be canceled at any time.[59] The test for determining if a trademark has become generic is whether the primary significance of the mark identifies the producer[60] or the product.[61] To the extent that the primary significance of the mark is to identify the product, the mark has become generic.

The rationale for preventing trademark protection for generic marks is simple: allowing a monopoly on the use of a commonly used term would be ludicrous. No individual should be able to appropriate existing terms in the language for their own commercial advantage when to do so would prevent competitors from using that term to describe their competing products.[62] When a trademark stops denoting the source of

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56. *Id.*

57. Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938).

58. For example, the Trademark Trial and Appeal Board held the mark ICE-PAK to be generic and therefore unregistrable. *In re* Stanbel, Inc., 16 U.S.P.Q.2d 1469, 1472 (T.T.A.B. 1990). *See also Clipper Cruise Line, Inc.*, 952 F.2d at 1048 (finding the term CLIPPER generic as applied to cruise ships).

59. Park' N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985); Lanham Act, 15 U.S.C. §§ 1064(3), 1065(4) (1992 Supp.). Although it is fairly common for marks to evolve from distinctive to generic through improper usage by the owner or genericide by competitors, some trademarks have moved from generic to distinctive. In 1896, the Supreme Court held that the trademark SINGER had become the generic name for a sewing machine. Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896). Singer continued to use their mark and a half century later re-established it as a distinctive mark. Singer Mfg. Co. v. Briley, 207 F.2d 519 (5th Cir. 1953).

60. The customer need not know what producer, just that it came from a single source. Roulo v. Russ Berrig & Co., Inc., 886 F.2d 931, 936 (7th Cir. 1989); Processed Plastic Co. v. Warner Communications, Inc., 675 F.2d 852, 856 (7th Cir. 1982).

61. 15 U.S.C. § 1064(3) (1988); *Kellogg Co.*, 305 U.S. at 118.

62. *See* Bernard v. Commerce Drug Co., 964 F.2d 1338, 1342 (2d Cir. 1992) (although finding the plaintiff's mark ARTHRITICARE merely descriptive, the court stated "[o]ur conclusion is bolstered by the concern that 'exclusive use of the term might unfairly "monopolize" common speech.' . . . According trademark protection to ARTHRITICARE could preclude forever manufacturers of products marketed to arthritis sufferers from using the root of the word 'arthritic' for their products.") *See also* United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918) ("The owner of a trade-mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly."); Dranoff-Perlstein Assoc. v. Sklar, 967 F.2d 852, 857 (3d Cir. 1992) ("Generic terms are denied trademark protection because granting one firm their exclusive use would place competitors at a serious competitive disadvantage.") (citing 1 GILSON, *supra* note 10, § 2.02, at 2-23); Hutchinson v. Essence Communications, Inc., 769 F. Supp. 541, 569 (S.D.N.Y. 1991) (remarking that "a trademark owner is not entitled to . . . pursue a course of action which, if successful, 'would be tantamount to awarding it exclusive dominion over a word in common usage,' with the consequent 'right to impair other parties' possible entrance into areas of endeavor far removed from its own.' ").

a good and instead identifies the good itself, it becomes the victim of genericide and ceases to function as a trademark.[63]

For our purposes here, descriptive marks are most interesting, because it is with descriptive marks that incontestability has the largest impact. Descriptive marks are those marks that only describe the good or service on which they are used,[64] or an attribute of that good or service.[65] In order to be registrable and enforceable, the owner of a descriptive trademark must show that the mark possesses secondary meaning.[66] If a descriptive mark lacks secondary meaning, it is said to be "merely descriptive" and, therefore, not registrable and not enforceable.[67]

Secondary meaning is the notion that if a word is used long enough and enough money is spent promoting the mark, the consuming public will, at some point, come to associate the word with the product[68] and, thereby, the word will attain trademark status. The "secondary" meaning attained by a word is that it functions not only as a word but also as a trademark—that is, a source indicating significance.[69]

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63. Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316, 1321-26 (9th Cir. 1982); Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75, 80-81 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

64. G. Heileman Brewing Co. v. Anheuser-Busch, Inc., 873 F.2d 985, 992 (7th Cir. 1989); Wynn Oil Co. & Classic Car Wash, Inc. v. Thomas, 839 F.2d 1183, 1190 (6th Cir. 1988).

65. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985); *Bernard*, 964 F.2d at 1341 ("a mark can be classified as descriptive if it conveys 'an immediate idea of some characteristic or attribute of the product.' " (quoting Papercutter, Inc. v. Fay's Drug Co., 900 F.2d 558, 562 (2d Cir. 1990))); Union Nat'l Bank, Laredo v. Union Nat'l Bank of Texas, Austin, 909 F.2d 839, 845 (5th Cir. 1990) ("A descriptive term is one that 'identifies a characteristic or quality of the article or service,'") (quoting Vision Center v. Opticks, 596 F.2d 111, 115 (5th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980)).

66. 15 U.S.C. § 1052(f) (1988); *Park 'N Fly*, 469 U.S. at 194; Coach House Restaurant, Inc. v. Coach and Six Restaurants, Inc., 934 F.2d 1551, 1559 (11th Cir. 1991); Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 786 F. Supp. 182, 194 (E.D.N.Y. 1992).

67. Papercutter, Inc. v. Fay's Drug Co., Inc., 900 F.2d 558, 562 (2d Cir. 1990); G. Heileman Brewing Co. v. Anheuser-Busch, 873 F.2d at 992; Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 694, 698 (1961) ("[W]ords which are merely descriptive of the qualities, ingredients or composition of an article cannot be appropriated as a trademark and are not entitled to protection unless they have acquired secondary meaning").

68. Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1354 (9th Cir. 1985) ("The basic element of secondary meaning is, thus, the mental association by a substantial segment of consumers and potential consumers 'between the alleged mark and a single source of the product.'") (quoting McCarthy, §§ 15:2 at 659, and 15:11(B) at 686); Volkswagenwerk Aktiengesellschaft v. Rickard, 492 F.2d 474, 477 (5th Cir. 1974).

69. Dranoff-Perlstein Assoc. v. Sklar, 967 F.2d 852, 858 (3d Cir. 1992) ("In order for secondary meaning to exist, 'it is not necessary for the public to be aware of the name of the [source] . . . . It is sufficient if the public is aware that the product [or

Suggestive trademarks are those marks which, although not arbitrary or fanciful, require some amount of imagination to determine what the association is between the trademark and the goods or services.[70] Suggestive marks, therefore, do not require a showing of secondary meaning to be validly registered and enforceable.[71] Examples of suggestive marks include COPPERTONE for suntan lotion[72] and HEARTWISE for use on vegetable protein meat substitute foods.[73]

Arbitrary[74] or fanciful[75] marks are those that have no mark/product association whatsoever at conception.[76] These marks are often referred to as "inherently distinctive" at least partially because they do not require secondary meaning in order to be registered or enforced.[77]

Only trademarks that are inherently distinctive or registrations that have become incontestable need not specifically be shown to have sec-

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service] comes from a single, though anonymous, source.' ") (quoting Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 380 (7th Cir. 1976)); Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 786 F. Supp. 182, 194 (E.D.N.Y. 1992) ("A mark has acquired secondary meaning when it 'has been used so long and so exclusively by one producer with reference to its article that, in that trade and to that branch of the purchasing public, the word or phrase has come to mean that the article was the first producer's trademark.'") (quoting G. Heileman Brewing Co. v. Anheuser-Busch, Inc., 676 F. Supp. 1436, 1467 (E.D. Wis. 1987), *aff'd*, 873 F.2d 985 (7th Cir. 1989)).

70. Union Nat'l Bank of Texas, Laredo, Texas v. Union Nat'l Bank of Texas, Austin, Texas, 909 F.2d 839, 845 (5th Cir. 1990); Forum Corp. of N.A. v. Forum, Ltd., 903 F.2d 434, 443 (7th Cir. 1990); J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 1121 (2d ed. 1984).

71. MCCARTHY, *supra* note 70, § 1120; Papercutter, Inc. v. Fay's Drug Co., 900 F.2d 558, 562 (2d Cir. 1990); G. Heileman Brewing Co. Inc. v. Anheuser-Busch, Inc., 873 F.2d 985, 992 (7th Cir. 1989). A precise discussion of suggestiveness is beyond the scope of this Article. The difference between descriptive and suggestive marks is often thought of as arbitrary. *See, e.g.*, Anthony L. Fletcher & David J. Kera, *The Forty-Third Year of Administration of the Lanham Trademark Act of 1946*, 80 TRADEMARK REP. 591, 670 (1990).

72. Douglas Lab., Inc. v. Copper Tan, Inc., 210 F.2d 453 (2d Cir. 1954).

73. Worthington Foods, Inc. v. Kellogg Co., 732 F. Supp. 1417 (S.D. Ohio 1990).

74. A mark is said to be arbitrary when it consists of a common word applied in an unfamiliar way. Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 11 n.12 (2d Cir. 1976).

75. Fanciful marks are those "invented solely for their use as trademarks." *Id.* at 11.

76. Coach House Restaurant, Inc. v. Coach & Six Restaurants, Inc., 934 F.2d 1551, 1560 (11th Cir. 1991); Johnson & Johnson v. GAC Int'l, Inc., 862 F.2d 975, 982 (2d Cir. 1988).

77. *Coach House Restaurant, Inc.*, 934 F.2d 1551 at 1559; Investacorp, Inc. v. Arabian Inv. Banking Corp., 931 F.2d 1519, 1522 (11th Cir. 1991); Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 694, 700 (2d Cir. 1961) ("The presumption that a fanciful word or mark becomes distinctive and identifies the source of goods on which it is used immediately after adoption and *bona fide* first use is basic in trademark law.") (citing HARRY D. NIMS, 2 UNFAIR COMPETITION & TRADEMARKS § 346 at 1078 (4th ed. 1947)).

ondary meaning in order to avoid being non-suited in a federal trademark infringement action. Trademarks that fall within the suggestive or arbitrary or fanciful categories are inherently distinctive and, therefore, need not be shown to possess secondary meaning.[78] The plaintiff, however, must show that a descriptive mark possesses secondary meaning or be dismissed for failing to state a claim upon which relief can be granted.[79]

Establishing secondary meaning is not an easy task for a trademark holder of a descriptive mark. It requires a certain degree of proof to show that a descriptive term has secondary meaning.[80] Therefore, if a plaintiff is not required to show that its mark has secondary meaning—that is, is granted statutory conclusive presumption of secondary meaning—the plaintiff gains a significant substantive advantage over an infringing third party. Likewise, if a plaintiff must show that its mark has attained secondary meaning because the plaintiff's mark is weak, an infringing defendant has a much better chance of success on the merits.

As will be developed below, this is precisely the role of incontestability. A weak but incontestable registration is still valid and may be enforced in some circuits under a statutory grant of validity, even though the mark is weak, and because of this lack of actual secondary meaning may be otherwise invalid.

B. Reasons for the Secondary Meaning Requirement

The requirement that an otherwise descriptive mark have secondary meaning before it is enforceable or registerable is justified as a facilitation on competition among producers.[81] If even descriptive, and therefore the weakest trademarks were granted protection from the point of in-

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78. *See generally* CHISUM & JACOBS, *supra* note 9, at § 5C[3][a].

79. General Time Instruments Corp. v. United States Time Corp., 165 F.2d 853, 854-55 (2d Cir. 1948); Black & Decker, Inc. v. North Am. Philips Corp., 632 F. Supp. 185, 194 (D. Conn. 1986); American Luggage Works, Inc. v. United States Trunk Co., Inc., 158 F. Supp. 50, 51 (D. Mass. 1957).

80. Vision Center v. Opticks, Inc., 596 F.2d 111, 118 (5th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980). *See also* Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 786 F. Supp. 182, 194 (E.D.N.Y. 1992) (finding that although the mark EXCEDRIN PM had attained secondary meaning, the combination "PM" standing on its own had not; "Bristol-Myers ha[d] failed to meet the 'heavy burden' of showing that the efforts undertaken to associate the 'PM' indicator with one source have been effective.") (citing 20th Century Wear v. Sanmark-Stardust, Inc., 815 F.2d 8, 10 (2d Cir. 1987)).

81. Industria Arredamenti Fratelli v. Charles Craig, Ltd., 725 F.2d 18 (2d Cir. 1984); Daniel J. Gifford, *The Interplay of Product Definition, Design and Trade Dress*, 75 MINN. L. REV. 769 (1991).

ception, it would amount to an obstacle to competition.[82] The holder of one mark could block the entrance into a specific market by other competitors by merely claiming trademark rights to a descriptive feature of the product.[83]

An owner of a weak mark should not be able to protect or enforce that mark against others because that owner's rights have not become clarified. Trademark rights to weak or descriptive marks become clarified by the consumers themselves when they come to associate a trademark with a producer of those goods. Unless the mark has secondary meaning, the mark is merely a word that other market participants presumably would need in order to describe adequately their products. Allowing trademark rights in a descriptive mark without secondary meaning would be essentially granting a monopoly on a word or words that competitors need to describe their goods.[84]

This is essentially the impact of incontestable trademark registrations—automatic secondary meaning without a specific evidentiary showing. This device is an extremely powerful weapon in trademark litigation.[85]

C. Incontestability Under the Lanham Act

Before analyzing the theoretical grounding of incontestability, it is important first to develop how incontestability functions.

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82. Attempting to enforce a descriptive mark and thereby attempting to monopolize a market could arguably violate the Sherman Act, 15 U.S.C. §§ 1-7 (1988), the Clayton Act, 15 U.S.C. §§ 12-27 (1988) and the Federal Trade Commission Act, 15 U.S.C. §§ 41-45 (1988). *See also* CPG Prods. Corp. v. Pegasus Luggage, Inc., 776 F.2d 1007, 1016 (Fed. Cir. 1985) (Rich, J., dissenting):

> the underlying principle involved in antitrust law: competition in the marketplace is to be encouraged and to that end copying—even outright, deliberate copying—is permitted as beneficial to consumers except where it is forbidden by patent law or deemed 'unfair' because it involves explicit or inherent falsification of some kind.

83. Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1430 (7th Cir. 1985) (there are a limited number of terms available to competitors to describe their products and a single party should not be allowed to "snatch for themselves the riches of the language and make it more difficult for new entrants to identify their own products"); ; 20th Century Wear, Inc. v. Sanmark-Stardust, Inc., 747 F.2d 81 (2d Cir. 1984) (terms should not be monopolized by a single use), *cert. denied*, 470 U.S. 1052 (1985); *In re* DC Comics, Inc., 689 F.2d 1042, 1044 (C.C.P.A. 1982) (descriptive terms should remain unencumbered for use by all to associate such symbols with their goods).

84. *See generally* William F. Gaske, *Trade Dress Protection: Inherent Distinctiveness as an Alternative to Secondary Meaning*, 57 FORDHAM L. REVIEW 1123 (1989); Justin Huges, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Timothy R.M. Bryant, *Trademark Infringement: The Irrelevance of Evidence of Copying to Secondary Meaning*, 83 NW. U. L. REV. 473 (1989).

85. Anthony L. Fletcher, *Incontestability and Constructive Notice: A Quarter Century of Adjudication*, 63 TRADEMARK REP. 71, 94 (1973).

1. Acquisition of Incontestable Status.—Currently, under the Lanham Act, a registration becomes "incontestable" after five years of continuous use and satisfaction of certain formalistic procedures.[86] Once a trademark registration becomes incontestable, the validity of the mark, the validity of the owner's ownership of the mark, and the owner's exclusive right to use the mark on designated goods may be challenged only on eight enumerated grounds.[87]

Acquisition of incontestable status is an amazingly simple procedure in light of the profound advantages the registrant receives. Merely by filing what is known as a Section 15 Affidavit[88] stating the mark has been in use for five consecutive years, and compliance with other minimal requirements,[89] a registration becomes incontestable.[90] There is no substantive review procedure by the Patent and Trademark Office, and no other proof of such five-year use is required.[91]

Once a Section 15 Affidavit is filed and accepted by the Patent and Trademark Office, the mark is considered incontestable and the owner can take advantage of section 33(b) of the Lanham Act. Although the term "incontestable" has been criticized as being misleading given the

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86. 15 U.S.C. § 1065 (1988). Although there is some literature to the contrary, § 1065 provides that the *right to use* a mark in commerce on goods for which it was registered becomes incontestable. *See, e.g.*, Money Store v. Harriscorp Fin., Inc., 689 F.2d 666, 671 (7th Cir. 1982) for the proposition that the *trademark* becomes incontestable. It is not the mark that becomes incontestable but, rather, the right to use the mark. This distinction becomes significant later in this Article when "trademark" is distinguished from "property."

87. 15 U.S.C. § 1115 (1988).

88. *Id.* § 1065; 37 C.F.R. §§ 2.167-168. *See also* GILSON, *supra* note 10, § 4.03[2][b].

89. The § 15 Affidavit must be signed by the registrant, identify the registration number and date of the trademark, recite the goods or services stated in the registration or if they are different the goods identified in the registration on which the mark has been used for five years, specify that there has been no adverse action to the registrant's claims of ownership, specify that there is no proceeding pending involving the registrant's ownership rights, be filed within one year of the expiration of any five-year period of continuous use, and include the appropriate fee ($100.00). 37 C.F.R. § 2.167.

90. The Patent and Trademark Office does not examine the merits of affidavits under § 15. Affidavits are processed and placed in the file without regard to their sufficiency. The Patent and Trademark Office merely notifies the registrant that the affidavit was "accepted" and that the file is stamped "Sec. 15 Affidavit Received." Affidavits are inspected, however, and if the error is substantial the registrant is notified. The Patent and Trademark Office has no requirement that the error be corrected because compliance with § 15 is completely voluntary. A registrant may choose not to take advantage of incontestability. PATENT & TRADEMARK OFFICE, U.S. DEP'T OF COMMERCE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1604 (1986).

91. *See* Chauncey P. Carter, *Trade-Mark "Incontestability"*, 36 TRADEMARK REP. 185, 186 (1946) (not the duty of the Commissioner to examine each mark as it comes up for registration but rather is left open for challenge in civil actions, cancellation proceedings, or other proceedings by affected parties).

numerous exceptions stated in section 33(b),[92] incontestable status provides powerful evidentiary advantages in trademark litigation[93] because an incontestable registration is "conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and the registrant's exclusive right to use the registered mark in commerce."[94] In other words, an incontestable registration is *conclusive evidence* of the registrant's interests in and to the mark.

The actual application of the concept of incontestability involves the simultaneous application of three sections of the Lanham Act—sections 14, 15, and 33.[95] Section 14 addresses when and how marks can be canceled.[96] First, section 14 lists five instances when a petition to cancel a registration of a mark may be filed by a person who believes that they have been or will be damaged by the registration:

1. Within five years from the date of the registration.[97]
2. Within five years of the date of publication under § 1062(c) of the Lanham Act of a mark registered under prior trademark laws.[98]

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92. Note, *Incontestable Trademark Rights and Equitable Defenses in Infringement Litigation*, 75 TRADEMARK REP. 158, 158 n.3 (1985); Percy E. Williamson, Jr., *Trade-Marks Registered Under the Lanham Act Are Not "Incontestable,"* 37 TRADEMARK REP. 404, 404 (1947).

93. GILSON, *supra* note 10, § 4.03[3]; Christensen, *supra* note 33. Christensen states that "[incontestability] has a significant impact on litigation. It is the main advantage of using trademark registrations in infringement actions, because it denies an alleged infringer important defenses." *Id.* at 1196-97.

94. 15 U.S.C. § 1115(b) (1988). American Express v. American Express Limousine Serv., 772 F. Supp. 729, 732 (E.D.N.Y. 1991) (granting plaintiff's request for a preliminary injunction with regard to defendant's use of plaintiff's incontestable mark AMERICAN EXPRESS).

95. 15 U.S.C. §§ 1064, 1065, and 1115 (1988), respectively. Texas Pig Stands v. Hard Rock Cafe Int'l, 951 F.2d 684, 693, 689, 690 (5th Cir. 1992).

96. 15 U.S.C. § 1064 (1988); Treadwell's Drifters Inc. v. Marshak, 18 U.S.P.Q.2d 1318, 1320 (T.T.A.B. 1990), *reh'g denied*, 18 U.S.P.Q.2d 1322 (T.T.A.B. 1991) ("Under Section 14(c) of the Trademark Act, a registration existing for over five years may be canceled only on the specific grounds enumerated therein, none of which involves ownership of the registered mark.").

97. 15 U.S.C. § 1064(1) (1988). *See* Strang Corp. v. The Stouffer Corp., 16 U.S.P.Q.2d 1309, 1310 (T.T.A.B. 1990) (holding a cancellation petition against respondent's mark, DON'S LIGHTHOUSE INN, was timely filed when filed on the fifth anniversary of the respondent's mark registration).

98. 15 U.S.C. § 1064(2) (1988). This provision is applicable only to marks registered under the trademark laws which preceded the Lanham Act—the Act of March 3, 1881, or the Act of February 20, 1905. Today, this subsection is of no relevance. Merriam-Webster, Inc. v. Random House, Inc., 18 U.S.P.Q.2d 1755, 1757 n.5, 1757-1758 (S.D.N.Y. 1991) (noting that while the mark COLLEGIATE may or may not be incontestable, based

3. At any time if the mark becomes generic, has become abandoned, its registration was obtained by fraud or was contrary to § 1052 (a)-(c) of the Lanham Act.[99]
4. At any time if the mark registered under prior acts is not published according to the Lanham Act.[100]
5. At any time if the mark is a certification mark and either the registrant fails to control the mark, the registrant engages in the production or marketing of any goods or services to which the certification mark is applied, the registrant permits use of the mark other than to certify, or the registrant discriminately refuses to certify anyone who maintains appropriate standards.[101]

This provision constitutes what has become known as "incontestability in the Patent and Trademark Office."[102] That is, the clear directive of

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on a failure to republish a 1905 Act registration, but not deciding this issue, presumably because the court found the combination mark WEBSTER'S COLLEGIATE to possess secondary meaning); Cullman Ventures, Inc. v. Columbian Art Works, Inc., 717 F. Supp. 96, 102 (S.D.N.Y. 1989) (holding plaintiff, who had republished its marks containing the phrase AT-A-GLANCE in 1949, had those marks infringed by defendant).

99. 15 U.S.C. § 1064(3) (1988). Prior to the 1988 amendment to the Lanham Act, there was much confusion about this subsection. Originally, this applied to "common descriptive name" and did not expressly say "generic." Christensen, *supra* note 33, at 1098. Since the term "common descriptive name" is not defined in the Lanham Act, courts generally, but not always, equated it with genericism. *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 531-32 n.7 ("A common descriptive name of a product or service is generic.") (citing 15 U.S.C. § 1064(c), the precursor to § 1064(3)). The Trademark Law Amendment Act of 1988 put this controversy to rest by changing "common descriptive name" to "generic" in § 1064(c).

100. 15 U.S.C. § 1064(4) (1988). *See* Sylvester J. Liddy, *The Lanham Act—An Analysis*, 37 TRADEMARK REP. 87, 100-02 (1947) (recommending and explaining republication of marks registered under the 1905 or 1920 Acts); Walter J. Derenberg, *Foreign Law Aspects of the New Trade-Mark Act of 1946*, 37 TRADEMARK REP. 711, 714, 726-30 (1947) (discussing renewal, registration, and republication of foreign marks previously registered under the 1905 or 1920 Acts).

101. 15 U.S.C. § 1064(5) (1988). Community of Roquefort v. William Faehndrich, Inc., 303 F.2d 494 (2d Cir. 1962) (citing 15 U.S.C.A. § 1064(d)(4), a prior version of § 1064(5) and granting summary judgment to plaintiff for defendant's infringement of plaintiff's certification mark ROQUEFORT.) The court noted that "a certification mark . . . must be made available without discrimination 'to certify the goods . . . of *any* person who maintains the standards or conditions which such mark certifies.' " *Id.* at 497 (emphasis in original); Opticians Ass'n of Am. v. Independent Opticians of Am., 920 F.2d 187, 194 (3d Cir. 1990) (holding 15 U.S.C. § 1064(5) inapplicable because the marks involved were trademarks or collective marks, not certification marks, and this section applies to marks registered as certification marks only).

102. GILSON, *supra* note 10, § 4.03[1]. This is known as "incontestability in the Patent and Trademark Office" because a party can file a petition to cancel a mark only with the Patent and Trademark Office. Although the Lanham Act gives courts authority to "rectify the register," 15 U.S.C. § 1119, an actual petition to cancel a mark is only

section 14(1) is that after the mark has been registered for five years, a petition to cancel the registration will not be accepted by the Patent and Trademark Office,[103] even if the registrant has failed to file affidavits with the Patent and Trademark Office.

This is the first step of the incontestability analysis. Once a mark is registered for five years, potentially harmed third parties may not file to cancel it. A third party may sue for infringement, but that third party may not petition the Patent and Trademark Office to cancel the registration.

The main import of section 15, the next step of incontestability application, is to clarify the meaning of incontestability (to the extent it can be clarified). Incontestability refers to the "right of the registrant to use such registered mark in commerce for the goods or services on or in connection with which such registered mark has been in continuous use for five consecutive years . . . and is still in use in commerce."[104] This also is the source of the Section 15 Affidavit that the Patent and Trademark Office requires before acknowledging statutory incontestability.[105]

Section 15 largely applies to prior users of the same mark on similar goods. Section 15 is meant to protect third parties who were using a mark before the registrant.[106] That is, granting a registrant incontestable status of its mark is subject to the four conditions set forth in section 15. These include the following:

1. There are no final decisions of any court adverse to the registrant's interests.[107]
2. There is no proceeding pending before the Patent and Trademark Office involving the rights of the registrant.[108]

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filed with the Patent and Trademark Office. Unless otherwise noted, this Article deals only with statutory incontestability and not this form of de facto incontestability. Courts have confused, from time to time, statutory incontestability with de facto incontestability and ignored the statutory requirements discussed *infra* to grant incontestability in a validity or infringement setting even though no § 15 Affidavits were filed.

103. In fact, the implied negative has been the manner in which § 14 has been applied. That is, unless stipulated in § 14, petitions for cancellation on other grounds will be denied. *See* Christensen, *supra* note 33.

104. 15 U.S.C. § 1065 (1988).

105. Affidavit or declaration under § 15, 37 C.F.R. § 2.167 (1991).

106. Christensen, *supra* note 33, at 1202.

107. 15 U.S.C. § 1065(1) (1988). *See* Texas Pig Stands v. Hard Rock Cafe Int'l, 951 F.2d 684, 694 (5th Cir. 1992) (holding plaintiff's mark PIG SANDWICH incontestable despite a sixty-two year old decision finding the mark unprotectable, because that prior decision simply dissolved a temporary injunction; it did not act as a final decision adverse to plaintiff's claim of ownership).

108. 15 U.S.C. § 1065(2) (1988). *See* Strang Corp. v. Stouffer Corp., 16 U.S.P.Q.2d

3. A Section 15 Affidavit is filed with the Patent and Trademark Office.[109]
4. The mark has not become generic.[110]

Section 15 also specifies the scope of incontestable rights. The first sentence of section 15[111] has been interpreted to mean that incontestability is limited to those goods on which the mark has been used for the requisite five-year period.[112]

Section 15 specifies the substance of incontestability. It is not the trademark itself that becomes incontestable, as some courts mistakenly articulate.[113] Rather, the registrant's right to use the mark on the goods

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1309, 1310 (T.T.A.B. 1990) (holding respondent's mark DON'S LIGHTHOUSE not incontestable because petitioner filed a cancellation petition by the fifth anniversary of respondent's mark's registration, which was still pending prior to the expiration of five years of continuous use); Sizzler Family Steak Houses v. Western Sizzlin Steak House, 793 F.2d 1529, 1540-41 (11th Cir. 1986) (finding fatal to the plaintiff's claim of incontestability in the mark SIZZLIN the fact that the lawsuit at issue had commenced prior to the plaintiff's filing of its § 15 Affidavit).

109. 15 U.S.C. § 1065(3) (1988); 37 C.F.R. § 2.167; 815 Tonawanda St. Corp. v. Fay's Drug Co., 842 F.2d 643, 646 (2d Cir. 1988) (holding no infringement because plaintiff had not proved it held rights to the service mark FAY'S prior to the defendant's registration of the same; court found that the defendant's mark became incontestable upon filing a § 15 Affidavit).

110. 15 U.S.C. § 1065(4) (1988). This Section also was amended with the 1988 Amendments. Under the prior version, this Section read "common descriptive name" of the goods. This was changed to read "generic name" of the goods because that is how courts had come to interpret it. Texas Pig Stands v. Hard Rock Cafe Int'l, 951 F.2d 684, 691-93 (5th Cir. 1992) (holding the plaintiff's trademark PIG SANDWICH not generic and, therefore, not subject to this defense); Seaboard Seed Co. v. Bemis Co., Inc., 632 F. Supp. 1133 (N.D. Ill. 1986) (finding plaintiff's trademark QUICK GREEN suggestive, not generic and, therefore, not subject to this defense); *but see* Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316, 1326 (9th Cir. 1982) (finding the defendant's trademark MONOPOLY had become generic and lost its incontestable status).

111. The first sentence of § 15 reads as follows: "[T]he right of the registrant to use such registered mark in commerce for the goods or services on or in connection with which such registered mark has been in continuous use for five consecutive years. . . ." 15 U.S.C. § 1065 (1988).

112. Christensen, *supra* note 33, at 1203. For example, in one case, the registrant registered his mark for use on air-conditioning equipment. The second-comer registered the same mark for use on heating equipment. The first registrant was enjoined from using his mark on heating equipment because the second-comer's registration had become incontestable for those goods. *See* Borg-Warner Corp v. York-Shipley, Inc., 127 U.S.P.Q. 42 (N.D. Ill. 1960), *modified on other grounds*, 293 F.2d 88 (7th Cir. 1961), *cert. denied*, 368 U.S. 939 (1961). *But see* Money Store v. Harriscorp Fin., Inc., 689 F.2d 666, 672 (7th Cir. 1982) (finding it reasonable for the defendant, who sought to use the mark MONEY STORE for money-lending purposes, to believe that the plaintiff's "pending registration for advertising services gave [plaintiff] no prior rights in the mark for money-lending purposes").

113. *See* Money Store v. Harriscorp Fin., Inc., 689 F.2d 666, 671 (7th Cir. 1982)

on its Section 15 Affidavit becomes incontestable. In other words, the registration becomes incontestable, not the mark itself.

Finally, section 33 is the "cutting edge of incontestability."[114] Section 33(a) applies to registrations which have not become incontestable. Section 33(b) applies to registrations that have become incontestable. Section 33(a) states that a trademark registration shall be *prima facie* evidence of the validity of the mark, the validity of the registration of the mark, the registrant's ownership of the mark, and of the owner's exclusive right to use the registered mark on the goods or services specified in the registration.[115] Section 33(b) states that an incontestable registration shall be *conclusive* evidence of the validity of the mark, the validity of the registration of the mark, the registrant's ownership of the mark, *and* of the owner's exclusive right to use the registered mark on the goods or services specified in the registration.[116] The key distinction between 33(a) and 33(b)—between non-incontestable and incontestable registrations—is that 33(a) grants *prima facie* evidence while 33(b) grants *conclusive* evidence of trademark rights.[117]

Once a registration has attained incontestable status, it may not be challenged except for the eight enumerated reasons set forth in section 33 of the Lanham Act.[118] Once a mark becomes incontestable, it is subject only to the following defects or defenses:

("Five years after registration of the mark, however, the *mark is 'incontestable'* by private parties . . . .") (emphasis added).

114. Christensen, *supra* note 33, at 1205.

115. 15 U.S.C. § 1115(a) (1988). *See* Oleg Cassini, Inc. v. Cassini Tailors, Inc., 764 F. Supp. 1104, 1108 (finding the plaintiff's registrations of the mark OLEG CASSINI presented prima facie evidence of its "exclusive right to use the marks on the various clothing and clothing-related products set forth in the [non-incontestable] registrations" and defendant's use of the mark CASSINI for tailoring services infringed the plaintiff's right).

116. 15 U.S.C. § 1115(b) (1988). It is significant that Congress chose the emphasized "and" rather than "or." It is largely the use of this "and" that clearly demonstrates Congress' intent to inappropriately expand trademarks protection beyond that recognized at common law. *See infra* notes 247-50 and accompanying text.

117. *See* Oleg Cassini, Inc. v. Cassini Tailors, Inc., 764 F. Supp. 1104, 1108 (W.D. Tex. 1990) (finding that although the plaintiff's non-incontestable marks benefitted from § 1115(a) prima facie evidence of exclusive use, its incontestable marks were subject to § 1115(b)'s presumption of conclusive evidence of exclusive use).

118. 15 U.S.C. § 1115(b)(1)-(8) (1988). *See* American Express v. American Express Limousine Serv., 772 F. Supp. 729, 732 (E.D.N.Y. 1991) (granting the plaintiff's motion for a preliminary injunction preventing the defendant from using the mark AMERICAN EXPRESS and noting the exclusive list of defenses available to the defendant, and addressing the eighth, laches); Union Carbide Corp. v. Ever-Ready Inc., 531 F.2d 366, 372-73 (7th Cir. 1976) (holding the defendant infringed the plaintiff's rights to the mark EVEREADY and listing the seven defenses in the statute at that time, finding none of them applicable, and then discussing several of them in the context of the offensive use of incontestability).

1. The registration was obtained fraudulently;[119]
2. The mark was abandoned by the registrant;[120]
3. The mark is being misused and no longer indicates the registrant as the source of the goods on which it is used;[121]
4. The mark is being used otherwise than as a trademark to describe a good or service;[122]
5. The registrant registered the mark subsequent to a regional user although the registrant has prior use nationally;[123]
6. The alleged infringing mark was registered and used first;[124]
7. The mark is or has been used to violate the antitrust laws of the United States;[125] and

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119. Orient Express Trading Co. v. Federated Dep't Stores, 842 F.2d 650, 653 (2d Cir. 1988) (finding that the plaintiff had committed fraud on the Patent and Trademark Office when it had "greatly exaggerated" the date of its first use of the mark ORIENT EXPRESS, the scope of its use, and its continuous use; also, the plaintiff had filed seventeen applications in anticipation of litigation, which the court found "disingenuous"); General Car and Truck Leasing v. General Rent-A-Car, Inc., 17 U.S.P.Q.2d 1398, 1401 (S.D. Fla. 1990) (holding that the plaintiff committed fraud on the Patent and Trademark Office when it registered the mark GENERAL and alleged it had been used on boats and aircraft, when in fact the plaintiff knew it never had).

120. Imperial Tobacco v. Philip Morris, Inc., 899 F.2d 1575, 1579-83 (Fed. Cir. 1990) (finding that the plaintiff had abandoned its mark JPS when it had not used the mark for the two years immediately preceding the defendant's filing of its cancellation petition).

121. General Motors Corp. v. Gibson Chem. & Oil, 786 F.2d 105, 110 (2d Cir. 1986) (finding that although the plaintiff licensed the mark DEXRON II to other businesses, these licensees were not misrepresenting the source of the product and, therefore, the mark was not subject to cancellation under this Section).

122. WCVB-TV v. Boston Athletic Ass'n, 926 F.2d 42, 46 (1st Cir. 1991) (holding that a local television station's use of the phrase BOSTON MARATHON a fair use because the mark is used not as a trademark, but for descriptive purposes only, to inform viewers that the station will broadcast the race).

123. Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 374 (7th Cir. 1976) (finding that the plaintiff could not argue incontestability with regard to the defendant because the defendant had acquired the right to use the mark EVER-READY prior to plaintiff's registration). *But see* Cullman Ventures, Inc. v. Columbian Art Works, Inc., 717 F. Supp. 96, 111-18 (S.D.N.Y. 1989) (finding that the defendant did not establish prior use of the mark AT-A-GLANCE because it had not acquired state or common law rights to the mark, the use it alleged was not continuous from a point prior to the plaintiff's registration, and any such use was not on the products involved in the lawsuit).

124. GILSON, *supra* note 10, § 4.03[3], at 4-32.20-21; DAPHNE ROBERT, THE NEW TRADE-MARK MANUAL 143 (1947).

125. Prior to the passage of the Lanham Act, most of the discussion regarding § 33 related to this subsection regarding violations of antitrust laws of the United States. In fact, the greater import of § 33 and what it did to trademark law in general was comparatively ignored. *See* Congressional Record House June 25, 1946; Williamson, *supra* note 92, at 409-10.

8. The registrant has violated common law rules of equity such as laches.[126]

2. Incontestability Is a Substantive Change to the Common Law of Trademarks.—Prior to passage of the Lanham Act, trademark registration was considered to be only procedural. Trademark registration granted no new substantive rights to an owner.[127] In fact, the common law notion of trademark rights was that the trademark existed independent of any statute and only arose out of prior exclusive appropriation and use.[128] Most significantly, in *E.F. Prichard* the Sixth Circuit stated that the title to a trademark is independent of its registration.[129] Prior to the Lanham Act, trademark registration had little, if any, meaning in the courts.[130]

When the Lanham Act was being discussed in committee, several Senators and other witnesses testified that the Act was intended to codify existing common law and not change substantive trademark law.[131] In fact, the first draft of one section—section 34—stated that nothing in the Act was meant to change the existing common law of trademarks.[132]

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126. American Express v. American Express Limousine Serv., 772 F. Supp. 729, 732 (E.D.N.Y. 1991) (granting the plaintiff's motion for a preliminary injunction preventing the defendant from using the mark AMERICAN EXPRESS, and denying the defense of laches).

127. United Drug Co. v. Rectanus Co., 248 U.S. 90, 99 (1918) (finding United Drug Co.'s registration of the mark REX did not give any rights beyond those at common law). "Registration creates no rights in a trade-mark. . . . It deprives no one of any rights possessed before, and confers upon the registrant no property rights that he would not have without such registration." ROGERS, GOOD WILL, *supra* note 12, at 109.

128. E.F. Prichard Co. v. Consumers Brewing Co., 136 F.2d 512, 518 (6th Cir. 1943), *cert. denied*, 321 U.S. 763 (1944). *See also* ROGERS, GOOD WILL, *supra* note 12, at 109.

129. *E.F. Prichard*, 136 F.2d at 518.

130. *Trademarks: Hearings Before the Comm. on Patents, Subcomm. on Trademarks, Hearings on H.R. 4744* 76th Cong., 1st Sess. 106-07 (1939) (statement of Mr. Rogers) ("Of course the purpose of the incontestable business is to clean house. The existing law is that a trade-mark of the registrant may be canceled at any time, and the courts interpret 'at any time' to mean just that.")

131. 92 CONG. REC. 7524 (1946). Representative Lanham stated that incontestability is "not intended to enlarge, restrict, amend or modify the substantive law of trademarks either as set out in other sections of the act or as heretofore applied by the courts under prior laws." Lanham also indicated that the Act itself "creates new rights, some of which are substantive and others procedural." 92 CONG. REC. 7524. Apparently, Lanham believed other aspects of the Lanham Act modified existing common law but incontestability did not.

132. "Nothing in this Act shall entitle the registrant to interfere with or restrain the use by any person of the same trade-mark or of a similar trade-mark for the same or like goods or services when such person by himself or his predecessors in business has continuously used such trade-mark form a date prior to the use or registration, whichever is the earlier, by the registrant or his predecessors." *Trade-marks: Hearings on H.R. 9041 Before the Subcomm. on Trade-marks of the House*

However, when it was pointed out to the committee that the proposed section 34 would be inconsistent with the Lanham Act's provisions regarding incontestability,[133] section 34 was promptly deleted.[134]

Courts, however, have refused to recognize the changes brought about by incontestability. Several courts since the enactment of the Lanham Act have acted as if nothing, in fact, had changed. This is peculiar because section 33 asserts that an incontestable registration shall be *conclusive* proof of the validity and ownership of the owner's right to use the mark. This has not stopped some courts from stating that trademark registration is only a method of recording ownership for purposes of serving notice of a claim of ownership and informing the public of that claim of ownership.[135]

Even the United States Supreme Court appeared to be unaware of the potential import of a passing statement it made in *Park 'N Fly*. In her majority opinion, Justice O'Connor stated that incontestability was "[a]mong the *new protections* created by the Lanham Act."[136] This statement by the Supreme Court is completely at odds with the express legislative intent of Congress when it enacted the Lanham Act. The Lanham Act was meant to codify common law and not to add new rights. The Supreme Court went a long way in its simple statement to recognize that the Lanham Act, especially through the incontestability provisions, substantively changed the existing common law of trademarks.

Not all courts have accepted this, as is evident in the confusion that arises whenever courts are called upon to adjudicate an issue regarding incontestability. This confusion results from two competing directives: legislative history and common law on one side and the language of the statute on the other. When both legislative history and the common law

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Comm. on Patents, 75th Cong., 3d Sess. 6 (1938) (reading of the bill H.R. 9041 into the record) [hereinafter *Hearings*]. The United States Trademark Association took this to mean that "nothing in this act shall affect any common-law rights acquired by a third party prior to the use or registration of the registrant." *Id.* at 64.

133. Especially the current § 33, codified at 15 U.S.C. § 1064 (1988).

134. *Hearings*, *supra* note 132, at 64. The USTA expressed concern that § 34(b) would remove "for the most part the incontestability privilege with which section 13 vests the registered trade-mark owner after a period of 5 years."

135. Schwinn Bicycle Co. v. Murray Ohio Mfg. Co., 339 F. Supp 973, 979 (M.D. Tenn. 1971), *aff'd*, 470 F.2d 975 (6th Cir. 1972) ("Registration of a trademark is at best but a method of recording for the purpose of serving notice of a claim of ownership, and informing the public and dealers with reference thereto."); *see also* B.B. Pen Co. v. Brown & Bigelow, 92 F. Supp. 272, 274 (D. Minn. 1950) (finding no infringement because the parties used the mark B & B in different trades); Griesedieck Western Brewery Co. v. Peoples Brewing Co., 149 F.2d 1019, 1022 (8th Cir. 1945) (allowing the parties concurrent use of the mark STAG in geographically distant territories).

136. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 193 (1985) (emphasis added).

tell the courts that there is nothing new in the Lanham Act, when in actuality there is, courts are very likely to be confused.

D. Congress' Express[137] Rationale Behind Incontestability

Incontestability in the Lanham Act was premised on the British system.[138] The legislative history of the Lanham Act indicates that Congress' rationale for including an incontestability provision was to make a certain date after which trademark rights would vest.[139] After that date, other trademark users would be on notice that an incontestable registration was subject only to certain defenses or defects.[140] This was thought to be similar to the concept of adverse possession or quieting title.[141] That is, at some point in time, it should be clear who owns the trademark, because the alternative would be chaos and confusion. Giving trademark owners a certain date after which their rights would become incontestable would provide clarity and predictability in the law,[142] so the argument goes.

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137. I use the term "express" here as opposed to "hidden" or "subliminal"—a point that will be developed below. *See infra* note 249 and accompanying text.

138. The British Trade Marks Registration Act, 38 & 39 Vict, Ch. 91 § 3 (1875); Fletcher, *supra* note 85.

139. *Hearings on H.R. 4744 Before the House Subcomm. on Trade-Marks of the House Comm. on Patents*, 76th Cong., 1st Sess. 106-07 (1939) (statement of Edward S. Rogers); Betty Ferber, *Trade-marks—Incontestability—Union Carbide Corp. v. Ever-Ready Inc.*, 18 B.C. INDUS. & COM. L. REV. 396, 425 (1976); Casper W. Ooms & George E. Frost, *Incontestability*, 14 LAW & CONTEMP. PROBS. 220, 223 (1949).

140. *Hearings on H.R. 4744 before the Subcomm. on Trade-Marks, Comm. on Patents*, 76th Cong., 1st Sess., 105-06 (1939) (remarks of Byerly); 92 CONG. REC. 7524 (remarks of Representative Lanham).

141. Naresh, *supra* note 8, at 982-84 (arguing that incontestability cannot be rationalized on the grounds of adverse possession because analogies to statutes of limitation only address the desirability of shifting an extant property right from one person to another and do not deal with the underlying concept); Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 198 (1985); *Hearings on H.R. 82 before the Subcomm. of the Senate Comm. on Patents*, 78th Cong., 2d Sess. 112 (1944) (statement of D. Robert); *Hearings on H.R. 82 before the Subcomm. of the Senate Comm. on Patents*, 78th Cong., 2d Sess., 21 (1944) (remarks of Representative Lanham); *id.* at 21, 113 (testimony of Daphne Robert, ABA Committee on Trade Mark Legislation); *Hearings on H.R. 102 et al. before the Subcomm. on Trade-Marks of the House Comm. on Patents*, 77th Cong., 1st Sess., 73 (1941) (remarks of Representative Lanham); *But see infra* notes 241-43 and accompanying text for the proposition that the use of property rhetoric is inappropriate.

142. *Hearings on H.R. 4744 before the Subcomm. on Trade-Marks, Comm. on Patents*, 76th Cong., 1st Sess., 128 (1944) (statement of Earl H. Thomson) ("a trademark adopter, when he has registered his trade-mark, wants to feel that after a period of time, certainly he will know that he owns that trade-mark and can maintain his right"); Ooms & Frost, *supra* note 139, at 232-33; Sylvester J. Liddy, *The Lanham Act—An Analysis*, 37 TRADEMARK REP. 87, 94 (1947) (quoting Caspar W. Ooms, the Commissioner of

It is particularly troublesome that Congress and certain commentators have chosen to use this property rhetoric when describing incontestability. As will be developed below, because trademarks themselves are not subject to property ownership, it is incorrect to use property rhetoric to describe them.[143] This use of property rhetoric misfocuses the analysis and is the cause of the adjudicatory chaos currently existing among courts in incontestability cases.

II. Effect of Incontestability

Simply stated, the effects of an incontestable trademark registration may be summarized as follows:

1. Plaintiff and holder of an incontestable registration does not have to prove secondary meaning for a weak mark that may otherwise be invalid and undefensible;[144]
2. Defendant non-holder of an incontestable mark is restricted to the eight enumerated attacks or defenses in section 33(b);[145]
3. Some courts equate an incontestable registration with a "strong mark;"[146] and
4. Plaintiff holders of descriptive marks are statutorily protected from attacks on the validity of their marks.

The life of the incontestability doctrine in trademark law has been quite confused in a variety of respects. For the first forty or so years of the existence of the incontestability doctrine, courts and scholars were not able to agree on whether incontestability could be used only as a defense to a challenge to the validity of a mark,[147] or if it also could

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Patents. Ooms said incontestability would give businesses the "assurance that [their marks] will not forever remain an object of attack" by other businesses using similar marks. Address delivered at the Annual Meeting of the A.N.A. at Atlantic City (Sept. 30, 1946)). *See also* F.T. Alexandra Mahaney, *Incontestability: The Park 'N Fly Decision*, 33 U.C.L.A. L. Rev. 1149, 1186 (1986) (recognizing that incontestability provides security and stability for mark owners).

143. *See infra* notes 241-43 and accompanying text. For example, McCarthy compares § 15 requirements to recording title to real estate. McCarthy, *supra* note 70, § 32:44. *See also* Daphne Robert, The New Trademark Manual 133 (1947) ("On its face, it would appear [incontestability] means that at some time the title to the property right in the mark is quieted and the rights of the registrant are forever secure").

144. Although some commentators argue that it should be impossible for a mark that is merely descriptive (i.e. lacking secondary meaning) to be registered, examples are numerous including the mark in *Park 'N Fly*.

145. Excluding any defenses defendant may have to the likelihood of confusion.

146. *See infra* notes 159-60 and accompanying text, and Appendix A *infra* notes 257-389 and accompanying text.

147. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 718 F.2d 327 (9th Cir. 1983), *rev'd*, 469 U.S. 189 (1985); Prudential Ins. Co. of Am. v. Gibraltar Corp. of Cal., 694

be used offensively to obviate the general requirement that the plaintiff show secondary meaning in a trademark infringement action.[148]

The confusion started in 1955 when Assistant Commissioner of Patents and Trademarks Leeds announced his position regarding the effect of incontestability: "The effect of 'incontestability' is a defensive and not an offensive effect. To put it another way, when the right to use a given mark has become incontestable, the owner's rights in the mark are in no wise [sic] broadened. . . ."[149]

Based upon this distinction, a split in the circuits developed surrounding the effect of incontestability. Some circuits concluded that an incontestable mark could be used only as a procedural, defensive mechanism to counter challenges to the validity of the mark. These courts held that a registrant could not use the incontestable status of a trademark to enjoin use by others if, for example, the mark is merely descriptive.[150]

F.2d 1150, 1153 (9th Cir. 1982), *cert. denied*, 463 U.S. 1208 (1983); Tillamook County Creamery Ass'n v. Tillmook Cheese and Dairy Ass'n, 345 F.2d 158 (9th Cir. 1965), *cert. denied*, 382 U.S. 903 (1965); Wrist-Rocket Mfg. Co., Inc. v. Saunders Archery Co., 516 F.2d 846 (8th Cir. 1975), *cert. denied*, 423 U.S. 870 (1975); Schwinn Bicycle Co. v. Murray Ohio Mfg. Co., 339 F. Supp. 973, 982 (M.D. Tenn. 1971), *aff'd*, 470 F.2d 975 (6th Cir. 1972); Haviland & Co. v. Johann Haviland China Corp., 269 F. Supp. 928, 936, 954 (S.D.N.Y. 1967); RUDOLPH CALLMANN, 4 UNFAIR COMPETITION AND TRADE-MARKS 2075-76 (2d ed. 1950); VANDENBURGH, TRADEMARK LAW AND PROCEDURE 467 (2d ed. 1968). *See generally* Pattishall, *supra* note 43, at 215 (most commentators believed from the initial enactment of incontestability that it was only a defensive tool).

148. United States Jaycees v. Philadelphia Jaycees, 639 F.2d 134, 137 (3d Cir. 1981); Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1184-85 (5th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); John R. Thompson Co. v. Holloway, 366 F.2d 108, 113-14 (5th Cir. 1966) (finding plaintiff's mark HOLLOWAY HOUSE not subject to any but the enumerated defenses); Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 377 (7th Cir. 1976); Ansul Co. v. Malter Int'l Corp., 199 U.S.P.Q. 596, 599-600 (T.T.A.B. 1978); Seiler's, Inc. v. Hickory Valley Farm, Inc., 139 U.S.P.Q. 460, 461 (T.T.A.B. 1963) (finding incontestability to be conclusive evidence of plaintiff's right to use its mark); Jockey Int'l, Inc. v. Burkard, 185 U.S.P.Q. 201, 206 (S.D. Cal. 1975) (offensive because the defendant did not counterclaim for cancellation, yet the court still allowed the plaintiff to rely on incontestability); Fletcher, *supra* note 85, at 96 (arguing the plain meaning of the statute is that there is no distinction). *See generally* Pasquale A. Razzano, *Incontestability: Should It Be Given Any Effect in a Likelihood of Confusion Determination?*, 82 TRADEMARK REP. 409, 411 (1992).

149. Rand McNally & Co. v. Christmas Club, 105 U.S.P.Q. 499, 500-501 (Comm'r Pts. 1955), *aff'd on other grounds*, 242 F.2d 776 (C.C.P.A. 1957). There is some indication that this entire distinction was based inappropriately on Leeds's comments. Apparently Leeds only meant that by "offensive use" a registrant could not claim a wider range of goods than identified in his application. By defensive effect, Leeds apparently only meant that the registration became incontestable as to the goods identified in the registrant's § 15 Affidavit. *See* Mahaney, *supra* note 142, at 1176; Fletcher, *supra* note 85, at 95 (Leeds's comments were dicta and taken out of context).

150. Mahaney, *supra* note 142, at 1175; ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS & COPYRIGHTS § 14.6, at 213 (1983).

Others, based on the Seventh Circuit's opinion in *Union Carbide*, found no such distinction in the Lanham Act.

The offensive/defensive distinction controversy arose not only over Leeds's "opinion," but also over the precise interpretation of the Lanham Act. Superficially, the offensive/defensive argument has some appeal. After all, section 33(b), the primary incontestability provision of the Lanham Act, is titled "Incontestability; defenses."[151] At first blush, it would appear that those items which appear in section 33(b) only apply to defensive uses of an incontestable mark. This was the reasoning of the Ninth Circuit in rejecting plaintiff's claims of trademark infringement in its opinion in *Park 'N Fly*.[152] According to the Ninth Circuit, the Lanham Act did not allow a trademark registrant to use the incontestable status of its mark in an offensive manner, especially when the mark was merely descriptive. The incontestability provisions of the Lanham Act, the court argued, only applied as defenses to claims that the mark was invalid; incontestability did not apply when the plaintiff was seeking to enforce the mark against others.

By 1983, the Ninth Circuit was the only federal circuit court that enforced the offensive/defensive distinction in the use of an incontestable trademark. In 1976, the Seventh Circuit overruled *John Morel & Co. v. Reliable Packing Co.*,[153] one of the primary cases recognizing a distinction between the offensive and defensive use of a trademark, and outright rejected the interpretation of the Lanham Act which allowed for a distinction between offensive and defensive use of a trademark, in the case of *Union Carbide Corp. v. Ever-Ready, Inc.*[154] The Seventh Circuit stated that "[t]here is no defensive/offensive distinction in the statute, and we do not believe one should be judicially engrafted on to it. . . ."[155] This put to rest the offensive/defensive distinction in every circuit but the Ninth Circuit. The United States Supreme Court had to overrule expressly the Ninth Circuit to convince it that the offensive/defensive distinction analysis of incontestability was dead.[156]

This, as well as other examples of confusion, indicates that there is something inherently unclear about the role and objectives of incontestability. If the statute were as clear as the Supreme Court believes,[157] these would be easy cases. Given that incontestability continues to be

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151. 15 U.S.C. § 1115(b) (1988).

152. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 718 F.2d 327 (9th Cir. 1983), *rev'd*, 469 U.S. 189 (1985).

153. 295 F.2d 314 (7th Cir. 1961).

154. 531 F.2d 366 (7th Cir. 1976), *cert. denied*, 429 U.S. 830 (1976).

155. *Id.* at 377.

156. *Park 'N Fly*, 469 U.S. at 197.

157. *Id.* at 194-97.

applied inconsistently, even in light of *Park 'N Fly*, there must be something about the concept of incontestability itself that prevents courts from analyzing and applying it in a consistent manner. It should be abolished, or at least reconsidered.

III. Current Application of Incontestability

The offensive/defensive distinction has not been the only split in the circuits regarding incontestability. In fact, "[t]here is probably no section of the Act which has caused more confusion in the courts than section 33(b). . . ."[158] A potentially more consequential split between the circuits, and even within each circuit, has developed regarding the issue of the weight a trial court should give to evidence of an incontestable registration. This is generally known as the strength of plaintiff's mark. The strength of a trademark generally means the mark's "tendency to identify the goods sold under the mark as emanating from a particular . . . source."[159]

The issue of whether a plaintiff's mark is strong is usually a primary inquiry when determining if a third party's use of the same or similar mark infringes the plaintiff's mark.[160] Although the specific wording differs, all circuits call this the likelihood of confusion test.[161] All circuits have a multi-factor test that is applied to determine if the relevant consumer would be likely to be confused regarding the source of the alleged infringer's goods. Besides the strength of the mark, some of the other factors include the similarity of the marks in sound, meaning, and appearance, the similarity of the consuming public, the similarity of the channels of trade, the sophistication of the consumer, the intent of the defendant, and any evidence of actual confusion. Actual confusion is not required in any circuit—the test is the *likelihood* of confusion. These factors are generally referred to as the *Polaroid* factors.[162]

Many expected that the Supreme Court in *Park 'N Fly* would settle all issues regarding incontestability including whether incontestability contributes to the mark's strength. However, *Park 'N Fly* fell far short of

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158. Gilson, *supra* note 10, § 4.03[3], at 4-29.

159. McGregor-Doniger, Inc. v. Drizzle, Inc., 599 F.2d 1126, 1131 (2d Cir. 1979).

160. This is also significant because most of the other elements of incontestability that have been the source of confusion have centered on more procedural matters. However, the strength of the mark often dictates whether the plaintiff will prevail. Therefore, whether incontestability contributes to the strength of the mark is more than an issue of whether the registrant can successfully defend an attack on the validity of its registration, but rather whether the plaintiff will actually prevail in its infringement action.

161. McCarthy, *supra* note 70, § 23:1.

162. Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961) (Friendly, J.), *cert. denied*, 368 U.S. 820 (1961); Mushroom Makers, Inc. v. R.G. Barry Corp., 580 F.2d 44, 47 (2d Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

expectations. Rather than clarify incontestability, the circuit courts apparently are now even more confused about incontestability than before *Park 'N Fly*. The table below depicts each court's specific holding regarding whether incontestability automatically confers "strength" to a trademark, whether incontestability is merely one element of that court's strength analysis, whether that court ignores incontestability in determining if a mark is strong, or if that court expressly excludes incontestability in making its strength analysis.

FEDERAL COURT HOLDINGS REGARDING STRENGTH OF THE MARK SINCE *PARK 'N FLY* [163]

CIRCUIT	Expressly does not consider incontestability relative to strength	Ignores incontestability relative to strength	Considers incontestability an element of strength	Expressly holds incontestability creates strength
First		D. Puerto Rico/ D. Mass./ CIRCUIT	D. Rhode Island/ D. New Hampshire/D. Mass.	
Second	S.D.N.Y	S.D.N.Y./CIRCUIT	S.D.N.Y./D. Conn.	D. Conn.
Third	D.N.J.	CIRCUIT	E.D. Pa.	
Fourth	M.D.N.C.		D.S.C.	W.D. Va.
Fifth		CIRCUIT/W.D. Tex.		S.D. Tex.
Sixth		CIRCUIT/E.D. Mich.	S.D. Ohio	CIRCUIT/ E.D. Mich.
Seventh	CIRCUIT			N.D.Ill.
Eighth	D. Minn.	D. Minn./D. Neb/W.D. Mo.		
Ninth	CIRCUIT/C.D. Cal.	CIRCUIT/D. Ariz.		
Tenth	CIRCUIT			
Eleventh		N.D. Ga./S.D. Fla.	S.D. Fla./M.D. Fla.	CIRCUIT
Federal		CIRCUIT		
D.C.	(no cases)	(no cases)	(no cases)	(no cases)

163. *See* Appendix A, *infra* notes 257-389 and accompanying text, for an annotated version of this table.

As is evident from the table above, there is absolutely no consistency within the courts regarding the use of incontestability in the strength of the mark analysis. With so much inconsistency, there can be no logical explanation for the divergence between and within the circuits regarding the question of whether an incontestable registration creates a presumption of a strong trademark. Not only are the circuit courts confused and inconsistent, the district courts within each circuit also are inconsistent and do not necessarily follow their circuit court's rulings.

For example, the Southern District of New York has variously held in the last five years that incontestability does not impact the strength of a mark,[164] that incontestability will be ignored relative to the strength of the mark,[165] and that incontestability should be one of the factors that goes into the analysis of whether or not the plaintiff's mark is strong.[166] Although one commentator has argued that the differences between the circuits in the application of section 33(b) could lead to forum shopping,[167] the application of incontestability is actually so confused that there is not even enough predictability within most circuits to encourage forum shopping.

In cases originally filed in the Southern District of Florida, one court ignored incontestability,[168] one court considered it a factor,[169] and the Eleventh Circuit concluded incontestability to be dispositive on the issue of strength.[170] Clearly, even within the circuits, the district courts are confused about the relevance of incontestability.

This inconsistency and split between the circuits is best exemplified by two cases, one out of the Eleventh Circuit and one out of the Seventh Circuit, that came to opposite conclusions regarding the strength of the mark analysis. In *Dieter v. B. & H. Industries of Southwest Florida*,[171] the Eleventh Circuit held that the trademark SHUTTERWORLD was

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164. Cullman Ventures, Inc. v. Columbian Art Works, Inc., 717 F. Supp. 96, 121 (S.D.N.Y. 1989); Marjorica S.A. v. Majorca Int'l, Ltd., 687 F. Supp. 92, 98 (S.D.N.Y. 1988).

165. W.W.W. Pharmaceutical Co. v. Gillette Co., 1992 U.S. Dist. LEXIS 7609 (S.D.N.Y. 1992); Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., 702 F. Supp. 1031, 1035-37 (S.D.N.Y. 1989), *rev'd on other grounds*, 875 F.2d 1026 (2d Cir. 1989).

166. Frito-Lay, Inc. v. Bachman Co., 704 F. Supp. 432, 435 (S.D.N.Y. 1989); Marshak v. Sheppard, 666 F. Supp. 590, 601 (S.D.N.Y. 1987).

167. Kathy J. McKnight, *Section 33(b) of the Lanham Act: What Effect in Trademark Infringement Litigation?*, 72 TRADEMARK REP. 329, 356 (1982).

168. Chase Fed. Sav. & Loan Ass'n v. Chase Manhattan Fin. Serv., Inc., 681 F. Supp. 771 (S.D. Fla. 1987).

169. Burger King Corp. v. Hall, 770 F. Supp. 633, 637 (S.D. Fla. 1991).

170. Dieter v. B. & H. Indus. of Southwest Fla., 880 F.2d 322 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 369 (1990).

171. *Id.*

incontestable and, therefore, valid and strong even if the mark was initially improperly allowed registration. The fact that the registration was incontestable was the controlling factor. Because the registration was incontestable, the mark was presumptively strong whenever the holder of that mark enforced it against others.[172]

In *Munters Corp. v. Matsui America, Inc.*,[173] however, the Seventh Circuit held that although plaintiff's registration for the mark HONEY-COMBE had become incontestable, that fact had no bearing on whether the mark was a strong mark for infringement purposes. Incontestability, the court reasoned, applied only to validity of a registration and not to a trademark infringement setting.[174]

In 1990, the Supreme Court had the opportunity to clarify this issue when both *Dieter* and *Munters* were appealed. However, the Supreme Court denied certiorari in both cases.[175] Various district courts have recently started following the *Dieter* lead, indicating that incontestability is synonymous with strength, rather than the contrary *Munters* position.[176]

The Supreme Court in *Park 'N Fly* ignored the issue of strength, and in doing so it condoned the status quo. Whereas before *Park 'N Fly* there was confusion and divergence between the circuits over the offensive/defensive use of incontestable marks, and whereas prior to the Trademark Amendment Act of 1988 there was confusion over use of equitable defenses to an incontestable mark, there now exists confusion and inconsistency over whether incontestability can be used (and to what extent) in the strength of the mark analysis.

Furthermore, although the Supreme Court set out to clarify incontestability in *Park 'N Fly*, it is apparent that it did not go far enough in its analysis. Merely stating that incontestability was new with the Lanham Act and holding that an incontestable mark could not be attacked for being merely descriptive did not clarify incontestability for the lower federal courts.

There have been two major attempts to clarify incontestability. The first was the Supreme Court's handling of *Park 'N Fly*. The second was the Trademark Revision Act of 1988, through which Congress added

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172. *Id.* at 328.

173. 909 F.2d 250 (7th Cir. 1990).

174. *Id.* It is indicative of judicial treatment of incontestability that the Northern District of Illinois refused to follow this bifurcation of the incontestability analysis. In Nike, Inc. v. "Just Did It" Enterprises, 1992 U.S. Dist. Lexis 13161 (N.D. Ill. 1992), the court chose to follow Sixth Circuit analysis and ruled that incontestability was evidence of a strong mark.

175. *Munters*, 111 S. Ct. 591 (1990); *Dieter*, 111 S. Ct. 369 (1990).

176. *See, e.g.*, Barnes Group Inc. v. Connelly, Ltd. Partnership, 793 F. Supp. 1277 (D. Del. 1992); Hesler Indus., Inc. v. Wing King, Inc., 23 U.S.P.Q.2d 1066 (N.D. Ga. 1992).

the eighth element to the enumerated defenses of section 33(b) to include equitable defenses. Yet, the courts are still hopelessly confused as to what this all means. Courts still apply incontestability one way in the Eleventh Circuit and a totally different way in the Seventh Circuit. District courts within these circuits are not even always in accord with their circuit courts on the application of incontestability. If courts have this much difficulty even after two major attempts at clarification, perhaps there is something more fundamentally wrong with incontestability. Perhaps it is not the courts that are at fault, but the concept of incontestability that is hopelessly flawed.

IV. The Illegitimacy of Trademark Incontestability

Incontestability is jurisprudentially unsustainable and should be repealed primarily because it is a congressional attempt to grant property status to a trademark itself. At common law, trademarks themselves have never been property. In fact, it is very well settled common law that there are no rights whatsoever in a trademark alone.[177] In the *Trade-Mark Cases*, the Supreme Court held that Congress did not have the authority to create new trademark rights because trademarks were not expressly provided for in the Constitution. Similarly, Congress' attempt to make trademarks themselves property via the incontestability provisions of the Lanham Act is suspect. To complicate matters further, courts generally use property rhetoric to describe trademarks themselves. This, as will be shown below, is quite problematic because there is, in actuality, no property right in the trademark itself.

First, in the context of trademark discourse, what does "property" mean? When courts and lay persons speak of "property" they are usually referring to a tangible object from which the owner has rights to exclude others.[178] In its earliest forms, property was land.[179] The concept of property was extended to include chattels in the nineteenth century.[180] Intangibles, such as trademarks, were not considered property in the sense that land or chattels were considered property, because intangibles could not be held, moved, or possessed.[181]

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177. *See, e.g.*, E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280 (9th Cir. 1992); Mister Donut of Am., Inc. v. Mr. Donut, Inc., 418 F.2d 838, 842 (9th Cir. 1969).

178. Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 Stan. L. Rev. 1343, 1354 (1989).

179. D. F. Libling, *The Concept of Property: Property in Intangibles*, 94 Law Q. Rev. 103 (1978).

180. *Id.*

181. *Id.* at 104.

Intangibles have become recognized as property because they demonstrate some of the classical incidents of ownership. Patents and copyrights, for example, are subject to the same types of exclusive control and rights of alienation to which other, more classical, forms of property are subjected. This may be, in part, because patents and copyrights are specifically mentioned in the United States Constitution.

Patent and copyright owners enjoy the "bundle of rights" notion of property. Their rights are divisible, freely alienable, and exclusive for the duration of statutory protection.[182]

Trademarks, on the other hand, enjoy none of the "bundle of rights" that other forms of property enjoy. Trademark holders possess only the right to exclude others from using that specific trademark on similar goods. Holders of marks possess the right to protect the sphere of interest in which they are using the mark by excluding others, but nothing more.[183] Mark holders do not possess a property right in the mark itself, because trademarks are nothing when devoid of the goodwill they have come to represent or the product on which they are used.[184]

In this sense, trademarks are completely distinct from patents and copyrights in their conceptual and jurisprudential grounding. The United States Constitution states in the Patent and Copyright Clause that authors and inventors will be given the exclusive right to use their inventions and writings "[t]o promote the Progress of Science and useful Arts."[185] This clause applies only to copyrights and patents.[186] There is no corresponding "Trademark Clause" in the United States Constitution.[187] Therefore, because the Constitution specifically refers to copyrights and patents, their conceptual grounding is distinct from trademarks.[188] Trademark rights in the United States arise only out of use.[189]

Because the Patent and Copyright Clause of the Constitution does not apply to trademarks, the Supreme Court struck down the Trademark Act of 1870 as unconstitutional in the *Trade-Mark Cases*.[190] The Court

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182. *See infra* notes 235-37 and accompanying text.

183. Trade-Mark Cases, 100 U.S. 82, 94 (1879).

184. E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1302 (9th Cir. 1992); Mister Donut of Am., Inc. v. Mr. Donut, Inc., 418 F.2d 838, 842 (9th Cir. 1969).

185. U.S. CONST. art. I, § 8, cl. 8.

186. *Trade-Mark Cases*, 100 U.S. at 94.

187. Person's Co., Ltd. v. Christman, 900 F.2d 1565, 1568 (Fed. Cir. 1990).

188. Pattishall, *supra* note 22, at 456; Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158 (1982).

189. For an analysis of the new "intent-to-use" system of trademark protection and the extent to which it creates trademark rights (all of which is beyond the scope of this Article), see Hellwig, *supra* note 39.

190. *Trade-Mark Cases*, 100 U.S. at 98-99.

held that Congress had to find a different constitutional grounding to grant new rights to trademark holders. To grant new trademark rights based on the Patent and Copyright Clause was invalid because that clause did not specifically mention trademarks. Congress constitutionally could enact a registration statute but not a statute that expanded trademark rights because it did not have the express constitutional authority to do so.

In the *Trade-Mark Cases*, the Supreme Court also shed some light on the notion of trademarks as property. The Court stated that the rights in and to a trademark grow "out of its *use*, and not its mere adoption."[191] That is, courts will protect a trademark holder's right to exclude third parties for as long as the trademark owner does not abandon the mark, but courts will not protect the ownership of the mark devoid of any source-indicating function by use on goods. The Supreme Court came to this conclusion based on the common law notion that trademarks themselves are not property and not subject to ownership.

Whether trademarks themselves are property subject to ownership should be analyzed using one of the well-accepted definitions of the concept of ownership, such as that of Honore.[192] Honore defines the leading incidents of ownership as including the following:

1. The right to possess;
2. The unfettered right to use;
3. The right to manage;
4. The right to the income;
5. The right to the capital;
6. The right to security;
7. The incident of transmissibility;
8. Absence of term;
9. Prohibition of harmful use;
10. Liability to execution; and
11. Residuarity.[193]

Honore defines the "right to possess" as the "exclusive physical control of a thing, or to have such control as the nature of the thing admits."[194] Honore claims that this, the primary incident of ownership,

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191. *Id.* at 94 (emphasis in original).

192. A.M. HONORE, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE (A.G. Guest ed., 1961). Honore's *Ownership* is recognized as one of the classical pieces in the property field of defining exactly what is property. Its brevity and clarity greatly adds to the accessibility others lack.

193. *Id.* at 8. An analysis of each incident should be unnecessary. What follows is an application of the primary incidents to trademarks as property.

194. *Id.* at 9.

implies the *exclusive* control of a thing and the right to remain in control.[195]

Trademarks do not even pass this first hurdle. Trademark holders do not have *exclusive* control of their marks. Various other entities may have simultaneous control of the exact trademark claimed to be "owned" by that competing entity. Not only are trademarks subject to the "fair use"[196] by others, trademark holders are powerless to control, for example, the use by others of their mark on unsimilar goods,[197] or their mark on similar goods sold to different consumers.[198] Thus, trademark holders do not have the exclusive right to control their mark and, therefore, do not have the exclusive right to possess the mark as defined by Honore.

Furthermore, trademark holders do not have the unrestricted right to use the mark. Trademark holders may not use their mark on a different product for which another has obtained prior trademark rights, either by use or registration.[199] Trademark holders are limited to the right to exclude others from the subsequent use of their mark or confusingly similar marks on similar products. They may not extend into unrelated areas and enforce their mark.[200] Therefore, trademark holders' rights to use their marks are heavily restricted.

State antidilution statutes provide the best example of this restriction.[201] Dilution is a theory said to be originally postulated by Frank

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195. *Id.*

196. 15 U.S.C. § 1115(b)(4) (1988).

197. Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252 (5th Cir. 1980) (use of DOMINO'S on pizza did not infringe use of DOMINO on sugar).

198. Perini Corp. v. Perini Constr., Inc., 915 F.2d 121 (4th Cir. 1990) (two users of identical PERINI name for identical construction services, summary judgment denied because of the different consumers and the level of sophistication of those consumers).

199. GILSON, *supra* note 10, § 5.05[5].

200. Unless, of course, such extension is expected from the products on which the mark was originally used. This is known as "bridging the gap." AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979). *See also* GILSON, *supra* note 10, § 5.05[5].

201. Twenty-five states now have antidilution statutes:
Alabama: ALA. CODE § 8-12-17 (Supp. 1992)
Arkansas: ARK. CODE ANN. § 70-550 (Michie 1992)
California: CAL. BUS. & PROF. CODE § 14330 (West 1987 & Supp. 1993)
Connecticut: CONN. GEN. STATE. ANN. § 35-11i(c) (West 1987 & Supp. 1992)
Delaware: DEL. CODE ANN. tit. 6, § 3313 (Supp. 1992)
Florida: FLA. STAT. ANN. § 495.151 (West 1988 & Supp. 1993)
Georgia: GA. CODE ANN. § 10-1-451(b) (Michie 1989 & Supp. 1992)
Idaho: IDAHO CODE § 48-512 (1977 & Supp. 1992)
Illinois: ILL. ANN. STAT. ch. 140, para. 22 (Smith-Hurd 1986 & Supp. 1992)
Iowa: IOWA CODE ANN. § 548.11(2) (West 1987 & Supp. 1992)
Louisiana: LA. REV. STAT. ANN. § 51:223.1 (West 1987 & Supp. 1993)

Schechter in 1927.[202] According to dilution discourse, a trademark's distinctive ability to signify one specific source for a product can be diminished or "diluted" if other trademark owners use very similar or identical marks even on totally unrelated goods. Schechter described the problem as the "whittling away" of the distinctive quality of the mark and its ability to indicate a single source for a product.[203]

Most dilution statutes can be read very expansively. The New York statute, representative of the legal regime of most, states as follows:

> Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.[204]

That is, the plaintiff should have grounds for an injunction if the distinctive quality of its mark is diluted by another regardless of com-

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Maine: ME. REV. STAT. ANN. tit. 10, § 1530 (West 1980 & Supp. 1992)
Massachusetts: MASS. GEN. LAWS ANN. ch. 110B, § 12 (West 1990)
Missouri: MO. ANN. STAT. § 417.061 (Vernon 1990 & Supp. 1992)
Montana: MONT. CODE ANN. § 30-13-334 (1992)
Nebraska: NEB. REV. STAT. § 87-122 (1987)
New Hampshire: N.H. REV. STAT. ANN. § 350-A:12 (1984)
New Mexico: N.M. STAT. ANN. § 57-3-10 (Michie 1987 & Supp. 1992)
New York: N.Y. GEN. BUS. LAW § 368(d) (McKinney 1984 & Supp. 1993)
Oregon: OR. REV. STAT. § 647.107 (1992)
Pennsylvania: 54 PA. CONS. STAT. § 1124 (1990)
Rhode Island: R.I. GEN. LAWS § 6-2-12 (1991)
Tennessee: TENN. CODE ANN. § 47-25-512 (1988 & Supp. 1991)
Texas: TEX. BUS. & COM. CODE ANN. § 16.29 (West Supp. 1993)
Washington: WASH. REV. ANN. § 19.77.160 (West Supp. 1993)

Most of these statutes are patterned after the Model State Trademark Bill (Uniform State Trademark Act § 12 (1967)). Note, *Trademark Dilution: Its Development, Japan's Experience, and the New USTA Federal Proposal*, 22 GEO. WASH. J. INT'L L. & ECON. 417, 425 (1988); *see* MCCARTHY, *supra* note 70, § 22:4, for the text of the Model State Trademark Bill. The proposed dilution provision of the 1988 Trademark Revision Act was not passed into law. Marie V. Driscoll, *The "New" 43(a)*, 79 TRADEMARK REP. 238, 245-46 (1989); Kim Muller, *An Inquiring Look at the Texas Anti-Dilution Statute*, 53 TEX. BAR J. 718, n.4 (1990).

202. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927). However, as a general theory, dilution can be traced back to a German case involving a mouthwash manufacturer, Judgement of Sept. 11, 1924, Landgericht Elberfeld, 25 Juristiche Wochemschrift 502, XXV Markenschutz und Wettbewerb (M.U.R.) 264. At the time of this case, both English and American courts were considering the concept as well. *See* Note, *supra* note 201, at 420-21.

203. Schechter, *supra* note 202, at 825.

204. N.Y. GEN. BUS. LAW § 368(d) (McKinney 1984 & Supp. 1993).

petition between them, regardless of the likelihood that consumers are confused, and regardless of whether or not the mark is registered.

A classic example of dilution theory at work applying the Illinois anti-dilution statute is *Polaroid Corp. v. Polaraid, Inc.*[205] There the defendant used the mark POLARAID on or in connection with the sale of its refrigeration and heating systems while the plaintiff had used its mark POLAROID on cameras for many years prior to defendant's use. Under traditional trademark theory, the plaintiff would not prevail in this situation because the products on which the marks are used are so different that the relevant consumer would not be confused into thinking a camera company was the source of its refrigerating system—that is, the products are not competing, and therefore no confusion is likely to occur. With no confusion, by definition, trademark infringement could not occur.[206]

However, relying solely on the Illinois anti-dilution statute,[207] the Seventh Circuit granted the injunction, stating that if the anti-dilution statute had not been applicable in this situation, "it is useless because it adds nothing to the established law on unfair competition . . . ."[208]

Most interestingly, and perhaps to the consternation of the *Polaroid* court,[209] generally courts have refused to interpret anti-dilution statutes as broadly as the clear meaning of the statute would allow.[210] The New York courts, for example, require evidence of confusion even though the New York statute clearly dictates that dilution may be found regardless of confusion.[211] Oddly enough, the Illinois courts will refuse to find dilution if there is confusion because "[a] trademark likely to confuse is necessarily a trademark likely to dilute."[212] The existence of these two diametrically opposed positions regarding the interpretation of virtually identical statutes is irreconcilable.

In *Mead Data Central v. Toyota*,[213] the Second Circuit dissolved an injunction regarding Toyota Motor Corporation's use of the trademark

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205. 319 F.2d 830 (7th Cir. 1963).

206. Pirone v. MacMillan, Inc., 894 F.2d 579, 581-82 (2d Cir. 1990).

207. ILL. ANN. STAT. ch. 140, para. 22 (Smith-Hurd 1961); *Polaroid Corp.*, 319 F.2d at 836.

208. 319 F.2d at 837.

209. *See also* David S. Welkowitz, *Reexamining Trademark Dilution*, 44 VAND. L. REV. 531 (1991).

210. Beverly W. Pattishall, *The Dilution Rationale for Trademark—Trade Identity Protection, Its Progress and Prospects*, 71 NW. U. L. REV. 618, 622 (1976).

211. *Id.* at 624 n.47 and references cited therein.

212. James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 274-75 n.16 (7th Cir. 1976).

213. Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., 875 F.2d 1026 (2d Cir. 1989).

LEXUS. The plaintiff had been using the trademark LEXIS in connection with its computer data retrieval systems since 1972. The Southern District of New York granted the injunction and awarded very creative damages to Mead Data Central.[214] However, the Second Circuit reversed and dissolved the injunction against Toyota.[215] In its opinion, the Second Circuit limited the anti-dilution statute to "famous" marks.[216] The Second Circuit did this even though the word "famous" does not appear in the New York anti-dilution statute.[217]

This holding, irreconcilable with the statute, is justified only if one recognizes that, even in light of the anti-dilution statute, the common law places extreme restrictions on the use of a mark by the trademark holder. Not to place this restriction on trademark holders would come too close to recognizing a trademark itself as property. If one has a property right in the mark itself, it would follow that one should be able to enjoin use of that mark on completely unrelated goods or services, regardless of the existence or non-existence of confusion. On the other hand, if no property right exists in the mark itself, then courts should only protect one's right to use that mark on exact or confusingly similar products.

The Second Circuit's reasoning in *Mead Data* reflects the greater common law tendency to draw distinctions and boundaries in order to avoid outcomes which the clear language of the state anti-dilution statutes would otherwise dictate. That is, rather than describing property rights in and to a trademark itself, it is conceptually more consistent with the evolution of trademark jurisprudence to say that an owner has property rights to *use* the mark on certain products, and not a property right in the mark itself.[218]

Carrying Honore's analysis through to its next applicable element, trademark holders do not possess a right of transmissibility or alienation as other "owners" do. The best example of this is the common law

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214. Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., 702 F. Supp. 1031, 1044-45 (S.D.N.Y. 1989). The court allowed Toyota to continue using the mark LEXUS on automobiles, but prohibited it from competing with Mead in computer-related fields; the court required Toyota to pay the costs incurred by Mead in the effort to inform all customers that there is no connection between them; the court required Toyota to disavow any relationship to Mead in all future advertising; and finally the court required Toyota to compensate Mead yearly for any diminution in the usefulness of Mead's LEXIS mark. However, Mead was permitted to use these funds only to supplement its own advertising designed to offset the effect of any diminution.

215. 875 F.2d at 1032.

216. *Id.* at 1031.

217. *See also* Michael L. Taviss, *In Search of a Consistent Trademark Dilution Test*, 58 U. CIN. L. REV. 1449 (1990).

218. Libling, *supra* note 179 at 104.

rule that trademarks are not assignable without the appurtenant goodwill.

Trademark ownership is assignable but an "assignment in gross" is an invalid transfer; unless the owner of a mark transfers the goodwill associated with the mark, the assignment transfers nothing. An attempted trademark assignment without the appurtenant goodwill is said to be a "naked assignment" or an "assignment in gross" and invalid.[219] This is so because at common law the only sustainable reason to grant legal protection of the mark was to protect the goodwill associated with that mark.[220]

In other words, a trademark "owner" does not even have the unrestricted right to alienate its mark apart from the business or trade in connection with which the mark is employed.[221] A trademark is nothing without the related goodwill or business which it has come to represent.[222] It is *use*[223] of a trademark alone that gives the mark value.[224]

However, just because something has value does not mean that it is therefore property. Long ago, Felix Cohen recognized the fallacy behind the logic of: *X* has "created a thing of value; a thing of value is property; [*X*], the creator of the property, is entitled to protection against third parties who seek to deprive him of his property."[225] This reap/sow logic as a rational justification for recognizing property in intangibles is said "to have so little reason that response is difficult."[226]

This Lockean labor theory of attempting to justify property interests in intellectual property—I spent time and energy on it therefore I own

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219. E. & J. Gallo Winery Corp. v. Gallo Cattle Co., 955 F.2d 1327, 1337 (9th Cir. 1992); Money Store v. Harriscorp Fin., Inc., 689 F.2d 666, 675-78 (7th Cir. 1982); Sands, Taylor & Wood v. The Quaker Oats Co., 18 U.S.P.Q.2d 1457, 1464-67; GILSON, *supra* note 10, §§ 3.07[1], [6]; MCCARTHY, *supra* note 70, § 18:1.

220. Steven L. Carter, *The Trouble With Trademark*, 99 YALE L.J. 759, 785 (1990). *But see* Vincent N. Palladino, *The Real Trouble With Trademarks*, 81 TRADEMARK REP. 150 (1991) (There has never been a clear relationship between trademarks and goodwill; Carter's assumption is grossly overstated.).

221. American Foundries v. Robertson, 269 U.S. 372, 380 (1925).

222. The doctrine of prohibiting assignments in gross, however, has currently evolved into mostly formalism. *See* MCCARTHY, *supra* note 70, § 18.2 at 800. Courts currently reserve use of the doctrine for only the more egregious cases such as when the assignee is not in the same business as the assignor, is not in a position to make use of the mark, and has no intention of doing so. Sands, Taylor & Wood Co. v. The Quaker Oats Co., 1992 U.S. App. Lexis 20674, *27 (7th Cir. 1992); Haymaker Sports, Inc. v. Turian, 581 F.2d 257 (C.C.P.A. 1978); Carter, *supra* note 220, at 786.

223. "Use" also includes a bona fide intent to use as defined by 15 U.S.C. § 1052 (1988).

224. Trade-Mark Cases, 100 U.S. 82, 95 (1879).

225. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935).

226. Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 178 (1992).

it—is now largely discredited.[227] In a society such as ours, the reward for labor is not and should not always be property. Inventiveness in marketing, which is a primary goal of trademark holders, is market share and increased sales—not property in the trademark itself (the vehicle of that inventiveness).[228] An entrenched property interest only breeds the opposite of what the goals of intellectual property should be—that is, recognizing near absolute property rights in a mark itself only would encourage manufacturers to sit on these property rights rather than actively compete.

Therefore, if it were possible to possess a property right in a trademark itself—-valuable or not—-one should be able to alienate it freely without restrictions as onerous as having to sell the very business it has come to represent.[229] That such an attempted alienation without the appurtenant goodwill is invalid indicates that trademarks cannot satisfy Honore's final incident of ownership—transmissibility.

One commentator has concluded that property rights in *descriptive* marks cannot be justified either on an economic basis or a possessory basis.[230] The "economic basis" for recognizing property rights is the notion that the more scarce a specific thing becomes, the more value it has. Unless someone has exclusive control of the thing, it cannot be put to its highest-valued use. Therefore, no one will invest the time and money to promote it without some assurance of reaping profits from its investment.[231] The "possessory basis" as a rationale for recognizing property rights is that the first to possess or occupy a thing ought to become its exclusive owner.[232]

However, property rights in trademarks themselves, descriptive or not, cannot be justified on these basic notions of property either. Trademarks, regardless of whether they are descriptive, are not scarce commodities. A newcomer selling a particular commodity can get rather close to the original trademark so long as it does not become "likely to cause confusion." That is, if competitors need a new trademark, all

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227. Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 821-35 (1990).

228. *Id.* at 834 n.68.

229. United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918) (trademarks are not a right in gross or at large like copyrights or patents, which are little value as an analogy when examining trademark law); Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405, 425 (1908) (a patent is clearly a private property right); McLean v. Fleming, 96 U.S. 245, 254 (1877); Canal Co. v. Clark, 13 Wall. 311, 322 (1871).

230. Naresh, *supra* note 8, at 986-90.

231. *Id.*; *see also* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 30-33 (3d ed. 1986).

232. Naresh, *supra* note 8, at 987; LAWRENCE BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 24-31 (1980).

they have to do is create it. Rather than a scarce resource, trademarks are unlimited—or more accurately, limited only by the creator's imagination.

Boudewijn Bouckaert concludes that the twin features of natural scarcity and possibility of physical possession—elements that justify property rights in oneself and tangible objects—do not justify recognition of property rights in any intellectual property.[233] Bouckaert argues that intellectual property should be called unjustifiable special privileges granted by government.[234]

Furthermore, no trademark at common law was protected from attack merely because one party "occupied" it first. Prior appropriation was the key element at common law, but attacks on a mark's validity were never foreclosed. There was no comparable concept to incontestability at common law. If a person adopted and began using a mark, that person was never free from attacks on validity, regardless of how long he used the mark or whether he chose to register it.

Although none of the traditional property right concepts support the creation of property rights in a trademark itself, this is not to say that the right to exclude others from using a trademark is not a property right. It very well may be.[235] The difference is that when others are excluded from something, such as the use of a piece of land (trespass), the excluding party owns the underlying entity as "property." In trademark discourse, after the right to exclude others, there is nothing left to own.

Furthermore, trademarks are clearly different from other forms of intellectual property such as copyrights. Copyrights are divisible and alienable without any regard to the value or business that may be associated with the copyrighted work.[236] Copyrights are also divisible. A copyright owner can assign the right to recreate the copyrighted work in movie form to one party and assign the right to recreate the work on T-shirts, for example, to an entirely distinct party.[237] Furthermore,

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233. Boudewijn Bouckaert, *What is Property?*, 13 HARV. J.L. & PUB. POL'Y 775 (1990).

234. This characterization is derived from Dale A. Nance, *Foreword: Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 757, 768 (1990).

235. *See* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

236. Copyright Act of 1976, 17 U.S.C. § 201(d)(2) (1977).

237. *See* Broadcast Music, Inc. v. CBS, Inc., 421 F. Supp. 592 (S.D.N.Y. 1983); H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 123-124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5738-5739 ("[T]he ownership of copyright, or any part of it, may be transferred by any means of conveyance or by operation of law, and is to be treated as personal property upon the death of the owner").

copyrights are treated as personal property at the death of the author or owner.[238]

Therefore, trademarks are different than other forms of tangible property and even intangible property, each of which have their grounding in the Constitution.[239] Trademarks are intangible property rights which grant the holder the right to exclude others from use of a mark on certain products. There are no property rights in the mark itself. The common law will not grant what would amount to new property rights in trademarks themselves. This is why courts do not recognize assignments in gross or the clear dictates of state anti-dilution statutes. If courts did, the result would be to recognize property rights in the marks themselves—something the common law has refused to do for centuries.[240]

Also, because trademarks cannot satisfy any of the main elements of Honore's incidents of ownership, trademarks differ from other tangible and intangible things that are subject to ownership. Because trademarks themselves are not subject to ownership, strictly speaking, there is no "trademark owner" but rather the "owner of the right to exclude others." Courts and commentators alike mistakenly refer to this as the "trademark owner" without regard to the significance of their error. Given that there is no trademark to own, there can be no trademark owner.

Commentators as well as judges often use property rhetoric to describe trademark rights.[241] When discussing trademarks, property rhet-

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238. *See* sources cited *supra* note 237.

239. Some feel that this distinction—trademarks evolving from common law while patents and copyrights are grounded in the Constitution—adds to their legitimacy. *See* Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261, 264-68 (1989) (patents are an illegitimate state granted monopoly that would be legitimate if they had evolved from common law like trademarks).

240. *See* Mahaney, *supra* note 142, at 1154.

241. *See, e.g.*, 2 RUDOLPH CALLMANN, UNFAIR COMPETITION AND TRADE MARKS (1945):

> But it is still problematic whether the courts will recognize a property right in a trade-mark [itself]. This remains so notwithstanding the fact that statutes refer to the "owner" of a trade-mark; courts use the term "owner" and "proprietor" of a trade-mark; trademarks have been called monopolies, property rights or "vested rights of property;" courts frequently adopt such phrases as "trespass upon property," "title" to a trade-mark and "chain of title," and have recognized that "theoretically and perhaps practically as well this hard-earned right is as important as money in the bank."

Id. § 66.3, at 821-22 (citations omitted). Another quotation is instructive on how loosely courts use the property rhetoric without any apparent concern for its significance:

> To prevail on a statutory or common law trademark infringement claim a plaintiff must demonstrate an infringement of this limited property right. He must establish that the symbols in which this property right is asserted are valid, legally protectible trademarks; that they are owned by plaintiff; and that defendant's

oric should be dispensed with to the extent possible.[242] The use of property rhetoric only confuses the valid rights of trademark holders. Ownership of a mark itself implies much more than what the common law has been willing to recognize. Therefore, use of the term "ownership" creates expectations that the holder should be treated as an "owner" rather than merely one who possesses a limited right to exclude others from using the mark. If one "owned" a trademark as defined by Honore, one should be able to sell the mark without the appurtenant goodwill and should be able to enforce the mark even though the alleged infringer's products do not compete. The use of property rhetoric causes courts to go through great contortions to validate outcomes still using property rhetoric. If property rhetoric were not used at all, courts would be at liberty to more clearly state the reasoning for specific decisions. Because courts are restrained by the property rhetoric, they are confined to use reasoning based on property concepts. However, when there is no actual property at issue—tangible or otherwise—courts and practitioners struggle to make sense out of the outcome.

The fact that legislators, judges, and commentators feel the need to refer to property rhetoric when referring to trademarks further indicates the misconception that most hold regarding trademarks. Given that trademarks themselves are not subject to ownership because they are not property, it follows that any concept or legal regime based on or furthering the notion that trademarks themselves are property and subject to ownership should be invalid. Such is the case with incontestability.

The incontestability provisions of the Lanham Act were a blind attempt at creating new rights never before recognized by the courts in the protection of trademarks.[243] Incontestability attempts to recognize property rights in the trademark itself. Today, courts and commentators

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subsequent use of similar marks is likely to create confusion as to origin of the goods.

Pirone v. MacMillan, Inc., 894 F.2d 579, 581-82 (2d Cir. 1990). A "limited property right" is, of course, never defined. However, by framing the analysis using this property rhetoric, the court is then confined to determine its outcome on whether it satisfies a "limited property right." However, because trademarks themselves are not property, the analysis is internally illogical.

242. This is why I prefer to use the term "trademark holder" herein rather than "trademark owner." I recognize that "holder" is also, to some extent, property rhetoric because it implies physical possession. However, the use of "holder" is an attempt to draw a distinction from the general notion of owning the underlying entity upon which rights are based.

243. Fletcher, *supra* note 85 (Incontestability was a faltering first step, moving trademark law from mere registration and procedural advantage to granting new substantive rights.).

alike have generally dismissed the notion that a trademark itself could be owned as property.[244]

It is quite significant that in 1947, the year the Lanham Act took effect, the well-respected trademark scholar, Dr. Rudolph Callmann,[245] concluded that the incontestability provisions of the Lanham Act finally recognized what no United States court had been willing to accept: the trademark itself could be owned outright and trademarks themselves were property.[246] So sure was he that a trademark itself was now property, in commenting on the incontestability provisions of the Lanham Act, Callmann concluded as follows:

> Moreover, the new Act gives "this property right a legislative standing it had not had before" by declaring trademarks incontestable after "continuous use for five consecutive years." This development should effectively put to rest all arguments advanced by opponents of the property right theory. . . . [I]t would seem that Section 15 of the Trade-Mark Act demonstrates Congressional willingness to recognize the trade-mark as property right.[247]

Callmann's article in which he made the above conclusion analyzes several cases prior to the Lanham Act that would seem to recognize a trademark as property and juxtaposes them against those cases that conclude a trademark is not the appropriate subject of property rights. Callmann's conclusion is based on cases where courts have found infringement even though the infringing party is not a competitor. This makes sense, Callmann argues, only if the trademark is property. In enacting the incontestability provisions, Callmann concludes that Congress expressly recognized this line of cases by granting trademarks property status.

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244. Internnational Order of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 919 (9th Cir. 1980); Libling, *supra* note 179; Fletcher, *supra* note 17, at 307; Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 413 (1916) ("common law trade-marks, the right to their exclusive use, are of course to be classed among property rights"); Person's Co., Ltd. v. Christman, 900 F.2d 1565, 1571 (Fed. Cir. 1990); Adams Apple Distrib. Co. v. Papeleras Reunidas, 773 F.2d 925 (7th Cir. 1985); American Steel Foundries v. Robertson, 269 U.S. 372 (1925); United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90 (1918) (there is no such thing as property in a trade-mark except as a right appurtenant to the established business or trade in connection with which the mark has been employed); Elderkin v. Monn, 80 N.W.2d 331, 334 (Iowa 1957); Fair Undercar Car, Inc. v. Wakefield, 1992 U.S. Dist. Lexis 10120 (N.D. Ill. 1992).

245. Callmann is also the author of the comprehensive treatise on trademarks, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES (1950).

246. Rudolph Callmann, *Unfair Competition Without Competition?: The Importance of the Property Concept in the Law of Trade-Marks*, 95 U. PA. L. REV. 443 (1947).

247. *Id.* at 467.

It is not difficult to imagine how Callmann could have been so confident that a trademark was now property. After all, the clear language of section 33(b) seems to indicate that the mark is subject to absolute ownership. Section 33(b) states that an incontestable mark "shall be conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's *ownership* of the mark, *and* of the registrant's exclusive right to use the mark. . . ."[248] If Congress did not intend to recognize "ownership of the mark" itself as something distinct from the holder's exclusive right to use the mark, it should not have listed each of these separate elements. Under the common law, only the element of exclusive use was ever recognized and that was never "conclusive."

That is, section 33(b) refers to the registrant's exclusive right to use the mark in commerce on specified goods as if this were something different from ownership of the mark. However, as argued above, since there is no actual "ownership" of the mark itself, it is completely unclear to what Congress referred when mentioning the "conclusive" evidence of the registrant's ownership of the mark. Courts have recognized only a limited right in a trademark to exclude others from using the mark on similar goods. By separating ownership of the mark (something not recognized at common law) from the exclusive right to use the mark (something recognized at common law), Congress raised the implication that there was an entity which could be absolutely owned—the mark itself. It is difficult to imagine that after twenty-six years[249] of studying the matter, Congress and Representative Lanham were not aware of this distinction.[250]

Callmann's theory of trademarks as property has been ignored by the courts. Since 1947 (the date Callmann's article was published), only one court in the United States cited Callmann's article, and it did so as supporting a contrary view to the proposition that the persuasive function of a trademark alone is generally not protected by courts.[251]

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248. 15 U.S.C. § 1115(b) (1988) (emphasis added).

249. The Lanham Act is said to be the culmination of twenty-six years of effort by Congress, business, and the bar to reform the old Trademark Act of 1905. *See* Comment, *Incontestable Trademark Rights and Equitable Defenses in Infringement Litigation*, 66 MINN. L. REV. 1067, 1067 n.2 (1982).

250. Representative Lanham must have been aware of this problem from the prior Act of 1870 which was struck down by the Supreme Court for granting trademark holders greater rights than allowed under the Constitution. Perhaps, in reality, Representative Lanham devised a way around the problem. In one sense, he gave a trademark essentially property status but did not call it property. Rather, he called it incontestable.

251. 88 Cents Stores, Inc. v. Martinez, 361 P.2d 809, 818 (Or. 1961). Callmann's article has been cited five times in major law reviews in the United States; however, only

Completely contrary to Callmann's perspective, rather than promoting and accepting trademarks as property, courts have even become more hostile to the notion since 1947. In fact, there is not a single case subsequent to the passage of the Lanham Act where a United States federal court concludes that a trademark is property and can be owned outright regardless of products on which the mark is used.

This does not mean that Callmann was totally wrong. In fact, Callmann at least had the foresight to read the plain meaning of the statute and give his well-reasoned opinion. The incontestability provisions, as worded, recognize a right more powerful and more significant than that previously recognized by courts prior to the passage of the Lanham Act. There are no conclusive presumptions of validity or registrant's ownership of the mark in the common law prior to the Lanham Act. There is no "ownership" of a mark separate from the "exclusive right to use" the mark at common law. Any reference to "ownership" can only be ownership of the right to exclude others, not of a right to possess and monopolize the mark itself.

Therefore, courts, too, are correct in concluding that there are no property rights in trademarks themselves. The trademark right depends upon use on products and only precludes others from using the same or similar mark on the same or similar products. Courts since the enactment of the Lanham Act unanimously agree with this proposition.

Callmann was correct in saying that incontestability on its face grants property rights in the mark itself. However, courts have also been correct in stating that the common law has never recognized property rights in the mark itself. In light of the additional fact that Congress, in order to survive constitutional scrutiny, intended only to codify the common law of trademarks and not create new rights,[252] it is only natural that

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once was Callmann's piece cited for the proposition that trademarks are property. *See* Kenneth York, *Extension of Restitutional Remedies in the Tort Field*, 4 UCLA L. REV. 499, 513, 533 (1957). All other cites to Callmann's piece are references to why anti-dilution statutes are required to deal with confusion where there is no competition. *See* Thomas Deering, *Trade-Marks on Noncompetitive Products*, 36 OR. L. REV. 1, 4 (1956); Walter J. Derenberg, *The Problem of Trademark Dilution and the Antidilution Statutes*, 44 CAL. L. REV. 439, 450 (1956); Pattishall, *supra* note 210, at 621; Welkowitz, *supra* note 209, at 534. Callmann is, of course, one of the leading proponents of a federal dilution statute and has been cited innumerable times for his stand on dilution. For a representative article by Callmann on his dilution position, see Rudolph Callmann, *Trademark Infringement and Unfair Competition*, 14 LAW & CONTEMP. PROBS. 185 (1949). The other leading proponent is Beverly Pattishall. *See* Pattishall, *supra* note 210.

252. As was shown previously, the legislative history of the Lanham Act is replete with references regarding the rights granted by the new statute. All references clearly state that no new substantive rights were intended to be created by the Lanham Act and that the Act is merely a registration statute. The purpose of the Lanham Act was to codify

courts are confused in how best to apply incontestability. If courts were to apply the incontestability provisions as written, they would intuitively realize that they would be recognizing trademarks as property. This, of course, would be diametrically opposed to the common law of trademarks for hundreds of years. Even though Callmann was correct in concluding that Congress intended to recognize property rights in a trademark itself, courts will not be agreeing with him anytime soon. Even in light of the Supreme Court's directive in *Park 'N Fly* that some courts have interpreted to be a directive to begin giving an incontestable mark its full effect,[253] courts have found judicially crafted ways to avoid recognizing a mark as property without ever saying so.

This is the primary source[254] of inconsistency and unpredictability

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the existing common law of trademarks and provide one, nation-wide uniform system of trademark registration and protection. The Committee on Patents and Trademarks, when debating the Lanham Act, concluded that "[t]he purpose of [the Lanham Act] is to place all matters relating to trade-marks in one statute and to eliminate judicial obscurity. . . ." S. REP. No. 1333, 79th Cong., 2d Sess. 1 (1946), *reprinted in* 1946 U.S.C.C.S. 1274. *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 531 (1987) (citing Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985), for the importance of a system of national trademark protection). The Committee also indicated the Lanham Act should "remedy constructions of the present acts which have in several instances obscured and perverted their original purpose. These constructions have become so ingrained that the only way to change them is by legislation." S. REP. No. 1333, 79th Cong., 2d Sess. 3 (1946), *reprinted in* 1946 U.S.C.C.S. at 1276. This language, offered by the Senate 46 years ago in support of the Lanham Act, is an appropriate call today for amendment of the judicially obscured concept of incontestability.

Similarly, courts have concluded that the Lanham Act is meant to be a registration statute. However, there is a line of older British cases that seem to equate trademarks with property. *See, e.g.*, Edelsten v. Edelsten, 1 De G.J. & S. 185 10 (N.S.) 780 (1863); Hall v. Barrows, 4 De G.J. & S. 150, 32 L.J.Ch. 548 (1863); Leather Cloth Co. v. American Leather Coloty Co., 4 De G.J. & S. 137 (1863); Singer Mfg. Co. v. Loog, 8 App. Cas. 15 (1882). For an analysis of these cases and their relationship to the issue of trademarks as property, see Callmann, *supra* note 246, at 454-55. The statute did not, most courts argue, create nor intend to create any new substantive rights for the trademark registrant.

253. Wynn Oil Co. v. Thomas, 839 F.2d 1183, 1187 (6th Cir. 1988).

254. Other sources of the inconsistent application of incontestability in general and § 33(b) include the claim that the incontestability provisions of the Lanham Act are poorly drafted. *See* Christensen, *supra* note 33, at 1196, 1207 (if Congress had only made its intentions clear through the language of the Act itself, courts would not be so confused in the application of incontestability). However, if statutory interpretation was the only issue at hand, it is unlikely that there would be such a divergence of opinion among the federal courts regarding how to apply incontestability. There are more than a few poorly drafted statutes that courts have had to apply. Simple ambiguity in the statute is not a reason why virtually every federal court in the United States reinvents the incontestability wheel each time they are called upon to apply it. Rather, when confronted with ambiguous or poorly drafted statutes, there are limited ways in which courts are expected to proceed.

among the circuits.[255] The clear language of the statute would imply a property right, but the legislative history and subsequent court opinions clearly preclude such a conclusion.

V. Conclusion

The concept of incontestability was a new, substantive addition to the law of trademarks. Trademark discourse would be greatly enhanced if that fact were openly recognized. This addition to the Lanham Act, although today well-used by trademark practitioners, has been a constant source of confusion to the courts. This has led to inconsistency among the courts to an astonishing degree.[256] This confusion stems from the

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The court first looks to the plain meaning of the statute. If the plain meaning of the statute does not answer the question as to how the statute should be applied, courts are to look to the legislative history for that particular provision. *But c.f.*, Frank Easterbrook, *What Does Legislative History Tell Us?*, 66 Chi.-Kent L. Rev. 441 (1990) (courts should not concern themselves with the intent of the legislature because it is not their intent that matters but rather what the statute itself actually means). If that is somehow inadequate, courts are then expected to look to how courts first in their jurisdiction and then in other jurisdictions have applied the same or similar provisions. However, on its face, § 33(b) is not ambiguous. Section 33(b) clearly states that an incontestable registration shall be conclusive evidence of the mark's validity and that the registrant owns the mark. Congress could not be more clear in drafting this portion of the Lanham Act. The directive to courts is to make an incontestable mark conclusive evidence of the validity and ownership of the mark. There is no ambiguity here. The inconsistencies between the federal courts cannot be easily explained and dismissed by simply arguing the statute is ambiguous.

Another factor at play is the fact that new rights were created by the Lanham Act, as was recognized by the Supreme Court in Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985); this may explain why the courts have been so confused. That is, for forty years prior to *Park 'N Fly*, the legislative history instructed courts that there were no new rights created by the Lanham Act; other precedent concluded that there were no new rights created by the enactment of the Lanham Act. However, in reality the Lanham Act did create "new rights" in the incontestability provisions and the Supreme Court has now recognized this.

255. This inconsistency should be kept in context. Substantial clarification was required at least two other times first by a Supreme Court ruling and then an act of Congress amending § 33(b). As was stated above, the Supreme Court in *Park 'N Fly* clarified that § 33(b) may be used in an offensive manner to enjoin an infringer and that an incontestable mark may not be challenged on the ground that the mark is merely descriptive. In 1988, Congress further clarified § 33(b) so that courts would no longer be confused regarding whether or not equitable defenses could still be used by a defendant when the plaintiff's mark was incontestable.

Few statutes in the history of the United States have required the express attention of the Supreme Court ruling and Congress to clarify its application and still remain ambiguous, confusing, and inconsistently applied by the courts. As this Article has shown up to this point, § 33(b) is still applied in completely unpredictable ways by the various federal courts. Clearly, § 33(b) of the Lanham Act has been and remains one of the greatest sources of controversy in Trademark law.

256. *See* Appendix A, *infra* notes 257-389 and accompanying text.

fact that incontestability is a departure from the common law of trademarks. As such, incontestability has not been given its full import by the courts. This is because to do so would be to recognize trademarks themselves as property—something the common law has declined to do for centuries. Because the statutory language of incontestability grants trademark holders property in marks themselves, and because incontestability itself is a departure from common law, it should be abolished.

APPENDIX A

Annotated Table

FEDERAL COURT HOLDINGS REGARDING STRENGTH OF THE MARK SINCE 1985[257]

CIRCUIT	Expressly does not consider incontestability relative to strength	Ignores incontestability relative to strength	Considers incontestability an element of strength	Expressly holds incontestability creates strength
First		D. Puerto Rico/ D. Mass./CIRCUIT	D. Rhode Island/ D. New Hampshire/D. Mass.	
Second	S.D.N.Y	S.D.N.Y./CIRCUIT	S.D.N.Y./D. Conn.	D. Conn.
Third	D.N.J.	CIRCUIT	E.D. Pa.	
Fourth	M.D.N.C.		D.S.C.	W.D. Va.
Fifth		CIRCUIT/S.D. Tex.		S.D. Tex.
Sixth		CIRCUIT/E.D. Mich.	S.D. Ohio	CIRCUIT/E.D. Mich.
Seventh	CIRCUIT			N.D.Ill.
Eighth	D. Minn.	D. Minn./D. Neb/W.D. Mo.		
Ninth	CIRCUIT/C.D. Cal.	CIRCUIT/D. Ariz.		
Tenth	CIRCUIT			
Eleventh		N.D. Ga./S.D. Fla.	S.D. Fla./M.D. Fla.	CIRCUIT
Federal		CIRCUIT		
D.C.	(no cases)	(no cases)	(no cases)	(no cases)

257. The year 1985 was chosen because that was the year of the *Park 'N Fly* decision. 469 U.S. 189. Although there were many incontestability cases prior to 1985, and some dealt with strength of the mark analysis, those are not addressed here because to do so would be completely redundant. Observing the past seven years of trademark opinions is more than adequate to establish that courts currently appear to be devoid of direction when adjudicating incontestability cases. Furthermore, there was the expectation that *Park 'N Fly* and the subsequent 1988 amendments would clarify incontestability. The fact that these attempts failed is made even more obvious by the table above.

1. First Circuit

The district courts within the First Circuit are confused and inconsistent in their analysis of whether an incontestable mark contributes to the mark's strength. Older cases seem to indicate it does not; newer cases seem to indicate it does;[258] some cases ignore it.[259]

In *Edison Brothers v. National Development Group, Inc.*,[260] the District Court of Massachusetts determined that incontestability "contributes to a mark's strength."[261] The court cited *Boston Athletics Association v. Sullivan*[262] as support for this proposition. Although the court in *Boston Athletics* does list three criteria to be used in determining the strength of the mark,[263] it is not a case regarding incontestability. Given that the plaintiff's mark in *Boston Athletics* was not registered until 1985, it is statutorily impossible for it to have become incontestable by trial in 1987. Therefore, the *Edison Brothers* court's reliance on *Boston Athletics* is confusing at best. This simply reinforces the notion that courts are confused about the application and impact of incontestability. That is, when a district court addressing an incontestable mark relies on a circuit court's opinion where an incontestable mark was not at issue, it seems to indicate the ignorance of the lower court regarding the effect of incontestability.

Another case addressing strength of an incontestable mark is *Decosta v. Viacom International, Inc.*[264] In *Decosta*, the District Court of Rhode Island stated that incontestability is an element to be considered when measuring the mark's strength.[265] As support for this, the court relied upon the Eleventh Circuit[266] and the Sixth Circuit.[267] The only reference to a First Circuit case was *Keds Corp. v. Renee International Trading*

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258. Alexis Lichine and Cie v. Sacha A. Lichine Estate Slections, Ltd., 229 U.S.P.Q. 294, 296 (D. Mass. 1985).

259. *See, e.g.*, Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812, 819 (1st Cir. 1987); Davidoff Extension S.A. v. Davidoff Comercio E Industria Ltda., 747 F. Supp. 122, 131 (D. Puerto Rico 1990).

260. 1992 U.S. Dist. Lexis 2839 (D. Mass. 1992).

261. *Id.* at *12-*13. The District Court of New Hampshire would apparently agree with this statement. *See* Kappa Sigma Fraternity v. Kappa Sigma Gamma Fraternity, 654 F. Supp. 1095, 1101 (D.N.H. 1987) (incontestability is a factor of strength along with national use and length of use).

262. 867 F.2d 22 (1st Cir. 1989).

263. The three criteria are: length of time the mark has been used and the plaintiff's popularity in field; strength of the mark in the plaintiff's field of business; and, the plaintiff's actions in promoting the mark. *Id.* at 32.

264. 758 F. Supp. 807 (D.R.I. 1991), *rev'd*, 981 F.2d 602 (1st Cir. 1992).

265. 758 F. Supp. at 814.

266. Dieter v. B & H. Indus. of Southwest Fla., 880 F.2d 322, 329 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 369 (1990).

267. Wynn Oil Co. v. Thomas, 839 F.2d 1183 (6th Cir. 1988).

Corp.[268] However, the court in *Keds* only raises incontestability to conclude that an incontestable mark is presumed to have secondary meaning.[269] Although this is generally accurate,[270] the court in *Decosta* clearly predicated that an incontestable mark is presumed to have secondary meaning and a mark with secondary meaning is presumed to be strong.

The First Circuit, however, reversed.[271] The First Circuit held that registering a trademark does not expand the substantive protections of that mark.[272] It refused to make any connection between the registration of a mark and its strength. The court ignored the incontestable status of the mark implying that any registered mark would be just as "strong" as any other. Although the court admitted that "'strength' relates to confusion and registration 'relates' (in this way) to strength," the court limited this analysis to validity of a trademark registration and not to the burden of proof in showing a likelihood of confusion.[273] In fact, it expressly stated that trademark registration only confirms for a reviewing court that a claimed mark is, in fact, a trademark.[274]

2. Second Circuit

The district courts within the Second Circuit are completely inconsistent in their treatment of incontestable trademarks. Some courts have held that an incontestable mark is not precluded from attacks on its strength merely because it has become incontestable.[275] Some recent opinions imply that the status of the mark should be, or at least will be, ignored in determining its strength.[276] In stark contrast to these

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268. 888 F.2d 215 (1st Cir. 1989).

269. *Id.* at 220-21.

270. McCarthy, *supra* note 70, § 32:44(B).

271. DeCosta v. Viacom, 981 F.2d 602 (1st Cir. 1992).

272. *Id.* at 612-13.

273. *Id.* at 616. The court expressly stated that it agrees with the Seventh Circuit's analysis of the effect of registration—it confers no substantive and limited procedural advantages. It is not clear from the opinion whether the First Circuit would now follow the Seventh Circuit's opinion regarding incontestability. Except for mentioning the fact that the mark was, indeed, incontestable, the court never again mentions that matter. Rather, it discusses the "registration" of the mark and ignores the "incontestability" of the registration. For that reason, I have categorized the First Circuit as "ignores" incontestability rather than "expressly does not consider" as the Seventh Circuit does.

274. *Id.*

275. Cullman Ventures, Inc. v. Columbian Art Works, Inc., 717 F. Supp. 96, 121 (S.D.N.Y. 1989); Marjorica S.A. v. Majorca Int'l, Ltd., 687 F. Supp. 92, 98 (S.D.N.Y. 1988).

276. W.W.W. Pharmaceutical Co. v. Gillette Co., 1992 U.S. Dist. LEXIS 7609 at *26-*28 (S.D.N.Y. 1992); Merriam-Webster Inc. v. Random House, Inc., 18 U.S.P.Q.2d 1755, at 1757 n.5, 1757-1758 (S.D.N.Y. 1991) (noting that while the mark COLLEGIATE may or may not be incontestable, based on a failure to republish a 1905 Act registration,

holdings, the District Court of Connecticut used incontestability (along with fame and registration) to conclude that the mark A-1 had "enormous strength."[277]

Some courts have held that incontestability is a prominent factor in determining the strength of a trademark. For example, in *Marshak v. Sheppard*,[278] the court found that incontestability contributed to the strength of the plaintiff's mark, THE DRIFTERS.[279] In *Frito-Lay, Inc. v. The Bachman Co.*,[280] the court held that the plaintiff's mark RUFFLES was incontestable, and that incontestability was an element of the mark's strength.[281]

In the Eastern District of New York, the matter was left ambiguous in *Transamerica Corp. v. Trans American Abstract Service, Inc.*[282] The court considered the strength of plaintiff's incontestable mark TRANSAMERICA by first looking at the mark's distinctiveness.[283] The court concluded that incontestability has a positive impact on determining a mark's distinctiveness but did not clarify whether incontestability also impacts strength.[284] Although ambiguous, the court does not appear to equate strength with distinctiveness.[285]

In the District Court of Connecticut, an incontestable mark is a presumptively strong mark. In *Haydon Switch & Instrument, Inc. v. Rexnord Inc.*,[286] the court expressed the opinion that incontestability makes a mark presumptively strong.[287] The court cited *Park 'N Fly* for the proposition that once a mark has become incontestable, it may not be challenged on the grounds that it is merely descriptive and that the mark is therefore "strong."[288] The court equates distinctiveness with strength and interpreted *Park 'N Fly*'s holding (that an incontestable mark could not be attacked on the grounds of mere descriptiveness) as

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incontestability is irrelevant for the purposes of this case, presumably because the court found the combination mark WEBSTER'S COLLEGIATE to possess secondary meaning); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 631 F. Supp 735, 741 (S.D.N.Y. 1985), *aff'd*, 799 F.2d 867 (2d Cir. 1986) (lower court concludes that incontestability is an element of strength, but the circuit court does not mention it in its strength analysis).

277. Nabisco Brands, Inc. v. Arnold Kaye and Arnie's Deli, Ltd., 760 F. Supp. 25, 27 (D. Conn. 1991).

278. 666 F. Supp. 590 (S.D.N.Y. 1987).

279. *Id.* at 601.

280. 704 F. Supp. 432 (S.D.N.Y. 1989).

281. *Id.* at 435.

282. 698 F. Supp. 1067 (E.D.N.Y. 1988).

283. *Id.* at 1072.

284. *Id.*

285. *Id.*

286. 4 U.S.P.Q.2d 1510 (D. Conn. 1987).

287. *Id.* at 1515.

288. *Id.*

meaning that incontestability contributes to the strength of the mark.[289]

3. Third Circuit

The Third Circuit's treatment of incontestability is particularly troubling.[290] First, the District Court of New Jersey held that although *Park 'N Fly* abolished any offensive/defensive distinction in reliance on an incontestable trademark, the Supreme Court had not gone so far as to allow a private right of action to be based solely on § 33(b).[291] Although ultimately reversed by the Third Circuit,[292] this holding by the District Court of New Jersey highlights the difficulties courts have had in applying incontestability doctrine. That is, in *Park 'N Fly*, the Supreme Court precisely allowed for private causes of action based on incontestable trademarks. That a court would attempt to cling to the old distinction even in light of the Supreme Court mandate simply identifies the great conceptual problem courts have with incontestability.

Even more disturbing is *Spirol International Corp. v. Vogelsang Corp.*[293] In an incredibly brief opinion, the court raises, dismisses, and then ignores the plaintiff's claim that its mark had become incontestable. Although in a cryptic footnote the court indicates that there may have been some suggestion at trial that the mark in question was obtained fraudulently,[294] the court totally ignores any incontestability analysis even though the court "assumes arguendo"[295] that the mark was, in fact, incontestable.

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289. *Id.*

290. Courts within the Third Circuit cannot even decide if strength of the mark is an element in their test for likelihood of confusion. *See, e.g.*, American Olean Tile Co. v. American Marazzi Tile, Inc., 9 U.S.P.Q.2d 1145, 1148 (E.D. Pa. 1988) (strength is an element); Apollo Distrib. Co. v. Jerry Kurtz Carpet Co., 696 F. Supp 140, 142 (D. N.J. 1988) (strength is an element; incontestability and length of use make a strong mark); Schering Corp. v. Schering Aktiengesellschaft & Berker Labs., Inc., 667 F. Supp. 175, 186-87 (D. N.J. 1987) (no clear statement on whether strength is element); Nippondenso Co., Ltd. v. Denso Distribs., 1987 U.S. Dist. LEXIS 3782 (E.D. Pa. 1987) (strength is not an element of likelihood of confusion analysis); Pedi-Care, Inc. v. Pedi-A-Care Nursing, Inc., 656 F. Supp. 449, 454-55 (D. N.J. 1987) (strength is not an element to likelihood of confusion test); Byrnes & Keifer Co. v. Flavoripe Co., 1 U.S.P.Q.2d 1124, 1127 (W.D. Pa. 1986) (strength is not an element of likelihood of confusion test); Tree Tavern Products, Inc. v. ConAgra, Inc., 640 F. Supp. 1263, 1269-70 (D. Del. 1986) (strength is an element of the likelihood of confusion test, but incontestability not considered in strength analysis); Trump v. Caesar's World, Inc., 645 F. Supp. 1015, 1021-22 (D. N.J. 1986), *aff'd without opinion*, 819 F.2d 1132 (3d Cir. 1987) (strength is not an element of likelihood of confusion test).

291. Weil Ceramics & Glass, Inc. v. Dash, 618 F. Supp. 700, 704 (D.N.J. 1985), *rev'd*, 878 F.2d 659 (3d Cir. 1989).

292. Weil Ceramics & Glass, Inc. v. Dash, 878 F.2d 659, 673 (3d Cir. 1989).

293. 652 F. Supp. 160 (D. N.J. 1986).

294. *Id.* at 162 n.1.

295. *Id.* at 162.

In another case out of the District Court of New Jersey, the court held that "[s]ection 33(b) of the Lanham Act allows a trademark owner to assert the sole right to use *only its exact mark.*"[296] This interpretation puts a new restriction on the offensive use of section 33(b) that is not found anywhere in the Lanham Act or the *Park 'N Fly* opinion. The court in *American Cyanamid Co. v. S.C. Johnson & Son, Inc.*, cited *Weil Ceramics & Glass Inc. v. Dash* to support the notion that section 33(b) only applies to an exact copy of a mark.[297] However, this reliance is misplaced. The language the court in *American Cyanamid* relied on in *Weil Ceramics* addresses the differences between an infringement action and a challenge to a mark's validity. In that sense, only the exact mark may be valid; however, it does not limit a registrant to asserting the sole use of only its exact mark. Unless an incontestable mark is given the same protection as any mark in an infringement setting—that is, infringed if the defendant's mark is likely to cause confusion regardless of whether the marks in question are exact—all purpose of section 33(b) is lost.

The court in *American Cyanamid* also stated that even an incontestable mark may be deemed weak.[298] This approach seems to be the general trend in courts in the Third Circuit which dismiss incontestability from the strength analysis.[299] This is opposed to recent cases from the Eastern District of Pennsylvania that have held that incontestability clearly contributes to a mark's strength.[300]

4. Fourth Circuit

Courts in the Fourth Circuit are no less confused than those in the Third Circuit regarding the application of incontestability and *Park 'N Fly*. In *Convenient Food Mart v. 6-Twelve Convenient Mart*,[301] one court went so far as to say that if a defendant counterclaims and attacks the validity of an incontestable mark, the plaintiff will be accorded the

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296. American Cyanamid Co. v. S.C. Johnson & Son, Inc., 729 F. Supp. 1018, 1024 (D.N.J. 1989) (emphasis added).

297. *American Cyanamid*, 729 F. Supp. at 1024 (citing Weil Ceramics & Glass, Inc. v. Dash, 11 U.S.P.Q.2d 1001, 1013 (3d Cir. 1989)).

298. 729 F. Supp. at 1024.

299. Institute for Scientific Information, Inc. v. Gordon & Breach, Science Publishers, Inc., 931 F.2d 1002, 1010 (3d Cir. 1991) (court refuses to find "mere descriptiveness" to avoid implications of *Park 'N Fly* but rather finds "clear descriptiveness"—a new concept nowhere else used in trademark law—to allow defendant to avail itself of fair use defense); Country Floors, Inc. v. Country Tiles, 930 F.2d 1056, 1063-64 (3d Cir. 1991).

300. Merchant & Evans, Inc. v. Roosevelt Bldg. Prods. Co., 22 U.S.P.Q.2d 1094, 1099 (E.D. Pa. 1991).

301. 690 F. Supp. 1457 (D. Md. 1988), *aff'd*, 870 F.2d 654 (4th Cir. 1989).

prima facie presumption and not the conclusive presumption[302] that the mark is valid. The court in *Convenient Food Mart* even cited *Park 'N Fly* for this proposition. In doing so the court completely misread *Park 'N Fly*. The Supreme Court in *Park 'N Fly* stated that a successful assertion of a section 33(b) defense shifts the presumption of validity from conclusive to prima facie. The Supreme Court did not say that a defendant need only *raise* a section 33(b) challenge, but rather that it must be "established."[303]

Regarding the use of an incontestable mark as a strong mark, the courts within the Fourth Circuit are quite divided. The District of South Carolina held in May of 1990 that incontestability can be considered in determining the strength of a mark.[304] In order to support this proposition the district court had to look elsewhere for precedent. It turned to *Dieter* from the Eleventh Circuit.[305] Coupled with the fact that the court found the mark suggestive, the court concluded that an incontestable mark was strong.[306]

However, just months later, the Middle District of North Carolina determined that incontestability has no bearing on a mark's strength. In *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*,[307] the court looked to cases from the Fifth[308] and Seventh[309] Circuits to support its conclusion. All of these cases ignored the earlier case of *Frances Denney, Inc.*[310] in which the District Court of West Virginia held that incontestability automatically gave the holder superior rights over the alleged infringer.

Therefore, if a plaintiff is suing in federal court in South Carolina, the plaintiff may expect an incontestable mark to play a role in the determination of the mark's strength. If that same plaintiff sues in North Carolina, just across the border, incontestability may have no bearing on determining the strength of that mark. Meanwhile, if that same

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302. 690 F. Supp. at 1460 (citing Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 199 n.6 (1985).

303. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 199 n.6 (1985).

304. Dollar Rent A Car Sys., Inc. v. Sand Dollar Car Rentals, Inc., 765 F. Supp. 876, 879 (D.S.C. 1990).

305. Dieter v. B. & H. Indus. of Southwest Fla., 880 F.2d 322 (11th Cir. 1989), *cert. denied*, 495 U.S. 928 (1990).

306. *Dollar Rent A Car Sys., Inc.*, 765 F. Supp. at 879-80.

307. 748 F. Supp. 344 (M.D. N.C. 1990), *aff'd*, 964 F.2d 335 (4th Cir. 1992).

308. Oreck Corp v. U.S. Floor Sys., Inc. 803 F.2d 166 (5th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).

309. Munters Corp. v. Matsui Am., Inc. 730 F. Supp. 790 (N.D. Ill. 1989), *aff'd*, 909 F.2d 250 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 591 (1990).

310. Frances Denney, Inc. v. New Process Co., 670 F. Supp. 661, 666 (W.D. Va. 1985).

plaintiff sues in West Virginia, the plaintiff may expect incontestability to weigh heavily in its favor.

5. Fifth Circuit

The Fifth Circuit has recently begun to establish itself as a leader in trademark cases.[311] Let us hope that this circuit's confusion regarding incontestability will not be followed blindly by others. The courts of the Fifth Circuit have variously held that *Park 'N Fly* applies only to validity and not to an infringement setting,[312] that incontestability is conclusive evidence of the registrant's exclusive right to use the mark,[313] and that an incontestable mark is deemed to be "totally incontestable."[314]

First, the Supreme Court made it very clear that the entire purpose of granting certiorari in *Park 'N Fly* was to dispel the notion that the Lanham Act drew any distinction between the use of an incontestable mark to defend its validity or to enforce it offensively.[315] The Fifth Circuit's conclusion in *Oreck Corporation*, therefore, is totally at odds with *Park 'N Fly*, and was ignored by the Southern District of Texas in *Service Merchandise*.[316]

Park 'N Fly was also completely ignored by the Fifth Circuit in *Texas Pig Stands, Inc. v. Hard Rock Cafe International Inc.*[317] In that case, the court found the mark PIG SANDWICH was descriptive and

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311. This happened when the Supreme Court followed the Fifth Circuit's minority position and held that inherently distinctive trade dress does not have to be shown to possess secondary meaning before it is enforceable against infringers. Taco Cabana v. Two Pesos, Inc., 112 S. Ct. 2753, 2756 (1992). Other prominent circuits are now quickly following. *See, e.g.*, Braun, Inc. v. Dynamics Corp. of Am., 975 F.2d 815, 825-26 (Fed. Cir. 1992). For the argument that *Taco Cabana* was wrongly decided, see David Q. Burgess, Comment, Taco Cabana *Missed the Point: Trade Dress Can Never Be Inherently Distinctive* (Apr. 15, 1992) (unpublished manuscript, on file with author). Burgess argues that unlike trademarks, trade dress can never be inherently distinctive. Therefore, he argues, courts should always require secondary meaning. *Id.*

312. Oreck Corp. v. U.S. Floor Sys., Inc., 803 F.2d 166, 171 (5th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987):

> *Park 'N Fly* merely held . . . that an infringement action brought by the holder of an incontestable mark may not be defended on the ground that the mark is merely descriptive and therefore invalid. [citation omitted]. *U.S. Floor*'s argument was not that Oreck's mark was invalid, but that it was not infringed because there was no confusion. *Park 'N Fly* says nothing to preclude this argument. Incontestable status does not make a weak mark strong.

313. Joy Mfg. Co. v. C.G.M. Valve & Gauge Co., 730 F. Supp. 1387, 1394 (S.D. Tex. 1989).

314. Service Merchandise Co. v. Service Jewelry Stores, Inc., 737 F. Supp. 983, 999 (S.D. Tex. 1990).

315. *Park 'N Fly*, 469 U.S. at 193, 203-205.

316. 737 F. Supp. 983.

317. 951 F.2d 684 (5th Cir. 1992).

needed secondary meaning to be valid,[318] even though it clearly recognized that the mark had become incontestable.[319] The court then proceeded to examine the mark for secondary meaning and concluded that the jury's finding of secondary meaning was not unfounded.[320]

In 1990, the Southern District of Texas held in *Service Merchandise* that incontestability deems a mark to have secondary meaning.[321] This conclusion apparently was not supported by the Fifth Circuit for it ignored *Service Merchandise* in its secondary meaning/incontestability analysis in *Texas Pig Stands, Inc.*[322] Finally, of interest in *Service Merchandise*, the court allowed the incontestability of one of the plaintiff's three marks to be used to establish secondary meaning for all three marks in question.[323] Clearly, the Southern District of Texas gives much more weight to an incontestable mark than the Fifth Circuit.

6. Sixth Circuit

In the Sixth Circuit, one case in particular stands out. In *Wynn Oil Co. v. Thomas*,[324] the court stated that:

> Permitting [defendant] to relitigate the original strength or weakness of the mark runs afoul of *Park 'N Fly*'s requirement that courts give full effect to incontestable trademarks. Therefore, while the strength of plaintiff's mark will still be at issue in cases involving contestable marks, once a mark is registered for five years, the mark must be considered strong and worthy of full protection.[325]

The court does not cite where in *Park 'N Fly* the Supreme Court states that a defendant cannot challenge the strength of an incontestable mark. Rather, the Supreme Court in *Park 'N Fly*, rightly or wrongly, seems to have declined the opportunity to settle that issue; for the Sixth Circuit to claim that it had is judicial fantasy.[326] If *Park 'N Fly* had

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318. *Id.* at 692-93.

319. *Id.* at 689-90.

320. *Id.* at 693.

321. Service Merchandise Co. v. Service Jewelry Stores, Inc., 737 F. Supp. 983, 999 (S.D. Tex. 1990).

322. The Western District of Texas also ignored incontestability relative to its strength analysis. American Auto. Ass'n v. AAA Ins. Agency, Inc., 618 F. Supp. 787, 792 (W.D. Tex. 1985).

323. *Service Merchandise Co.*, 737 F. Supp. at 999.

324. 839 F.2d 1183 (6th Cir. 1988).

325. *Id.* at 1187.

326. This has not stopped the Sixth Circuit from making the same conclusion elsewhere with no supporting authority. *See, e.g.*, Wynn Oil Co. v. American Way Serv. Corp., 943 F.2d 595, 600 (6th Cir. 1991). *See also* Gougeon Bros., Inc. v. Hendricks, 708 F. Supp. 811, 815 (E.D. Mich. 1988) (implying that if plaintiff's mark had been incontestable the court would have been obliged to assume its strength).

only been this clear and direct, perhaps some of the resultant confusion among the federal courts could have been avoided.

There are also district courts within the Sixth Circuit that have held that incontestability should only be one of the factors used when analyzing the strength of a trademark. For example, in *Great American Insurance Co. v. GRE America Corp.*,[327] the Southern District of Ohio considered many factors in conducting an analysis of the strength of the plaintiff's trademark. Among these factors was the fact that the mark was incontestable. However, the court relied on the plaintiff's extensive use and diligent enforcement of its rights to find the plaintiff's mark strong and infringed.[328]

Finally, there are three cases in Ohio where the courts virtually ignored the fact that plaintiff's mark has attained incontestability in making their analysis of its strength. In *Oskiera v. Chrysler Motor Corp.*,[329] although the plaintiff's mark had become incontestable, the court ignored that fact and relied on the mark's secondary meaning.[330] In *Little Caesar Enterprises v. Pizza Caesar, Inc.*,[331] the court considered the strength of the plaintiff's trademark without any reference to the fact that it had become incontestable.[332] Finally, in *Crain Communications, Inc. v. Fairchild Publications, Inc.*,[333] the court made mention of the mark's incontestability, but then the court did not apply the incontestable status to the analysis of the mark's strength. Rather, the court relied on the plaintiff's continuous use and survey evidence to conclude that the trademark was strong.[334] The court in *Crain Communications* does, in fact, cite to *Wynn Oil*,[335] the case that held that an incontestable mark is, by definition, a strong mark. However, the court in *Crain Communications* cited *Wynn Oil* only for the factors to consider in determining likelihood of confusion, but ignored what it said about incontestability.[336]

The cases in the Sixth Circuit are completely irreconcilable. Even holdings within the Sixth Circuit Court of Appeals are inconsistent.

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327. 1990 U.S. Dist. Lexis 17011 (S.D. Ohio 1990).

328. *Id.* at *9-*11.

329. 21 U.S.P.Q.2d 1471 (6th Cir. 1991).

330. *Id.* at 1473.

331. 834 F.2d 568 (6th Cir. 1987).

332. *Id.* at 571.

333. 12 U.S.P.Q.2d 1214 (E.D. Mich. 1989).

334. *Id.* at 1215. Although the court recognizes the mark's incontestability and notes that this gives the plaintiff the exclusive right to use it, the court does not then draw the connection to strength. Instead, it decides the testimony and exhibits relating to publication, circulation, and survey results make the mark strong. *Id.* at 1215-17.

335. *Id.* at 1215 (citing *Wynn Oil*, 839 F.2d 1183 (6th Cir. 1988), the case that held that an incontestable mark by definition is a strong mark).

336. 12 U.S.P.Q.2d at 1215.

These inconsistent cases are within only a few years of one another. In fact, *Wynn Oil* and *Oskiera* have a judge in common, even though that judge did not write either opinion.[337]

7. Seventh Circuit

The Seventh Circuit has consistently interpreted *Park 'N Fly* to mean that incontestability is relevant only in analysis of the validity of a trademark and plays no role in whether a mark is strong. The Seventh Circuit interprets section 33(b) as applying to the validity of a mark *only*, and not to the analysis of likelihood of confusion. More specifically, the court in *Munters Corp. v. Matsui America, Inc.*,[338] held that the fact that plaintiff's mark had become incontestable was only relevant to establishing that it had a valid and existing trademark. The court stated that incontestability should play no role in determining whether a mark has been infringed.

In *Chicagoland Jobsource*,[339] the Northern District of Illinois stated that "validity and likelihood of confusion are distinct issues . . . , and an incontestability finding in no way concludes the confusion question; incontestability does not mean strength."[340] Furthermore, the Northern District of Illinois held in *Source Telecomputing*,[341] that "the conclusive presumption that the marks have secondary meaning established by the statutory incontestability of plaintiff's . . . marks does not automatically transfer into a conclusive presumption of strength in a likelihood of confusion analysis."[342]

The Seventh Circuit's analysis relies on a distinction it has drawn between validity and infringement when applying incontestability doctrines. This is done because the statute expressly says that section 33(b) is subject to proof of infringement. However, nowhere in *Park 'N Fly*, nor anywhere in the statute, does it say that such a distinction between validity and infringement should be made when applying incontestability. If a mark is granted a conclusive presumption of secondary meaning and is, therefore, not merely descriptive for validity purposes,[343] it does not follow then to say the same mark is merely descriptive and, therefore,

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337. John W. Peck, Senior Circuit Judge.

338. 909 F.2d 250 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 591 (1990).

339. Source Serv. Corp. v. Chicagoland Jobsource, Inc., 643 F. Supp. 1523, 1532-33 (N.D. Ill. 1986).

340. *Id.* at 1532-33.

341. Source Serv. Corp. v. Source Telecomputing Corp., 635 F. Supp. 600 (N.D. Ill. 1986).

342. *Id.* at 610. *See also* Master Protection Corp. v. Firemaster Co., Inc., 1990 U.S. Dist. LEXIS 15352, *5-*7 (N.D. Ill. 1990) (holding that incontestability sheds no light on likelihood of confusion).

343. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 201-03 (1985).

very weak for infringement purposes. If this was the intent of the Supreme Court in *Park 'N Fly*, it seems that the Court would have clearly stated that incontestability has absolutely no role in infringement analysis.[344] Rather, this distinction appears to be how the Seventh Circuit avoids another possible problem that the Supreme Court left open in *Park 'N Fly*—that is, if a merely descriptive mark is mistakenly registered by the Patent and Trademark Office, it should not at any point be enforceable against a third party simply because the registrant filed a Section 15 Affidavit and the mark attained incontestable status.

This problem could be resolved easily, however, by allowing courts to correct the Principle Register pursuant to the Lanham Act. Marks that should not have been registered in the first place would thereby be barred from enforcement against third party "infringers" and trademarks would be given their full meaning—the alleged intention of *Park 'N Fly*.[345]

At least one district court within the Seventh Circuit apparently has refused to accept the Seventh Circuit's stand on incontestability. In *Nike, Inc. v. "Just Did It" Enterprises*,[346] the court concluded that incontestability is evidence of a mark's strength[347] and cited *Wynn Oil v. Thomas* for that proposition.[348] It is amazing that the Northern District of Illinois felt compelled to look to a contrary circuit court case for guidance on this issue when their own Seventh Circuit has clearly held that incontestability has no bearing on a mark's strength for infringement purposes.

8. Eighth Circuit[349]

The Eighth Circuit considers incontestability irrelevant to a mark's strength. In *Woodroast Systems*,[350] the court stated that "the court notes . . . that the incontestability of a mark does not affect its strength."[351]

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344. In fact, any language that does exist in *Park 'N Fly* is to the contrary. For example: "[w]e conclude that the holder of a registered mark may rely on incontestability to enjoin infringement . . . ." *Id.* at 205.

345. *See* Wynn Oil Co. v. Thomas, 839 F.2d 1183, 1187 (6th Cir. 1988).

346. 799 F. Supp. 894, 897 (N.D. Ill. 1992).

347. *Id.*

348. *Id.* (citing *Wynn Oil*, 839 F.2d 1183 (6th Cir. 1988)).

349. As of the date of this writing, the Eighth Circuit has not cited *Park 'N Fly* for any substantive reason that bears mentioning.

350. Woodroast Sys., Inc. v. Restaurants Unlimited, Inc., 793 F. Supp. 906 (D. Minn. 1992)

351. *Id.* at 912 n.10. Curiously, the court in *Woodroast* cites General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 626 (8th Cir. 1987) to support this proposition. However, the Eighth Circuit in *General Mills* only held that *registration* does not affect a plaintiff's ultimate burden of proof in showing likelihood of confusion. It is an illogical extension

The District Court of Minnesota even appears to consider incontestability irrelevant to the issue of validity. In *Murrin v. Midco Communications, Inc.*,[352] the court stated that although the mark was incontestable, it did not mention this fact when concluding that the plaintiff's mark was valid.[353]

9. Ninth Circuit

As the circuit where the controversy of *Park 'N Fly* arose, one would expect courts in the Ninth Circuit to follow the Supreme Court's opinion *Park 'N Fly* closely.[354] However, the Ninth Circuit actually began a new divergence of opinions regarding incontestability that was only later settled by the 1988 Amendment to Lanham Act.

In *Jaycees*, the Eighth Circuit stated that *Park 'N Fly* precluded equitable defenses because they were not mentioned specifically in section 33(b).[355] The Ninth Circuit, however, stated that *Park 'N Fly* allows equitable defenses to an incontestable mark.[356] These two points of view are diametrically opposed to one another.

The Ninth Circuit excludes incontestability from the analysis of a mark's strength. For example, in *E. & J. Gallo Winery v. Gallo Cattle Co.*,[357] the court found the plaintiff's mark strong because it had acquired secondary meaning, not because the mark was incontestable.[358] Most

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to conclude then that none of the benefits of registration should be considered in the likelihood of confusion analysis. The Eighth Circuit in *Woodroast* also cites American Cyanamid Co. v. S.C. Johnson, Inc. 729 F. Supp. 1018, 1024 (D. N.J. 1989) as controlling.

352. 726 F. Supp. 1195 (D. Minn. 1989).

353. *Id.* at 1200. *See also* Hallmark Cards, Inc. v. Hallmark Dodge, Inc., 634 F. Supp. 990, 992-98 (W.D. Mo. 1986) (although a mark is incontestable, that fact does not affect court's analysis of strength); Omaha Nat'l Bank v. Citibank, N.A., 633 F. Supp. 231, 234-35 (D. Neb. 1986) (although incontestable, court looks to third party licenses to find mark suggestive and therefore strong and ignores incontestable status).

354. In fact, on remand, the Ninth Circuit issued an extremely cursory opinion, only mentioning the Supreme Court's opinion overruling it for the narrow holding before it, and ignoring all else that was said. 782 F.2d 1508, 1509 (9th Cir. 1986) (on remand).

355. U.S. Jaycees v. Cedar Rapids Jaycees, 794 F.2d 379, 382 (8th Cir. 1986).

356. Pyrodyne Corp. v. Pyrotronics Corp., 847 F.2d 1398, 1402-03 (9th Cir. 1988), *cert. denied*, 488 U.S. 968 (1988).

357. 12 U.S.P.Q.2d 1657, 1659 (E.D. Cal. 1989) (finding the marks GALLO incontestable), *modified and aff'd*, 955 F.2d 1327 (9th Cir. 1992), *amended*, 1992 U.S. App. LEXIS 14119 (9th Cir. 1992).

358. *E. & J. Gallo*, 955 F.2d at 1338-1339. There are numerous other examples in the Ninth Circuit where courts appear to ignore the fact that the plaintiff's mark has become incontestable. *See, e.g.*, Century 21 Real Estate Corp. v. Magee, 19 U.S.P.Q.2d 1530, 1534 (C.D. Cal. 1991) (court relies on precedent from other circuits to find plaintiff's mark strong); First Interstate Bancorp v. Stenquist, 18 U.S.P.Q.2d 1159, 1162 (N.D. Cal. 1990) (court found plaintiff's mark strong relying on nine years of use, fame in the banking industry, and advertising expenditures).

recently, the Ninth Circuit has reaffirmed this position stating that incontestability has nothing to do with the strength of a mark.[359]

The case in the Ninth Circuit most often cited for the proposition that an incontestable mark has no relevance to the strength of the mark appears to be *Miss World Ltd. v. Mrs. America Pageants, Inc.*[360] However, such reliance appears to be misplaced. The court in *Miss World Ltd.* analyzed strength as follows: First, the court examined the mark's distinctiveness in terms of the continuum from generic to arbitrary and determined that incontestability made the mark at least more than generic. Second, the court investigated the strength of the mark in the marketplace. This "strength in the marketplace" must be something other than secondary meaning because the court admits that an incontestable mark is presumed to have secondary meaning.[361] The court does in fact look to incontestability to establish the significance of the mark. The confusion arises when the court concluded that "incontestable status does not *alone* establish a strong mark."[362] The Ninth Circuit has relied on this language to conclude that incontestability should play no role in determining a mark's strength.[363] This much *is* clear: the court in *Miss World Ltd.* did not preclude the use of incontestability in determining a mark's strength—only that it alone does not establish strength. Relying on this case to conclude that courts are precluded from relying on a mark's incontestability when determining its strength is a misstatement of language in *Miss World Ltd.*[364]

10. Tenth Circuit

The District Court of New Mexico has stated that a trademark is "incontestable (i.e. valid) if *either* it was registered for more than five years before the counterclaim was filed, . . . or it has acquired a secondary meaning."[365] This is a complete misstatement of the law for a

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359. Visa Int'l Serv. Ass'n v. Eastern Fin. Fed. Credit Union, 1992 U.S. App. Lexis 14965 (9th Cir. 1992) (not appropriate for publication; citation limited by court rules).

360. 856 F.2d 1445, 1449 (9th Cir. 1988).

361. *Id.* at 1448 n.4.

362. *Id.* at 1449 (emphasis added).

363. *See, e.g.*, Visa Int'l Serv. Ass'n v. Eastern Fin. Fed. Credit Union, 1992 U.S. App. Lexis 14965, at *3-*4 (9th Cir. 1992) (not appropriate for publication; citation limited by court rules).

364. *See also*, Lindy Pen Co., Inc. v Bic Pen Corp., 796 F.2d 254, 257 (9th Cir. 1990) (plaintiff's mark incontestable but weak nonetheless); National Yellow Pages Serv. Ass'n v. O'Conner Agency, 9 U.S.P.Q.2d 1516, 1519 (C.D. Cal. 1988) (registration and incontestability in and of themselves do not establish a strong mark).

365. Foremost Corp. of Am. v. Burdge, 638 F. Supp. 496, 499 (D. N.M. 1986) (emphasis added).

variety of reasons. This may be the best example of a court's total confusion over *Park 'N Fly* and incontestability in general.

First, incontestability is not automatic.[366] Incontestability is acquired only if the registrant chooses to file a Section 15 Affidavit with the Patent and Trademark Office.[367] That is, a mark conceivably could be registered for a lot longer than five years and still not be incontestable if the registrant has not filed a Section 15 Affidavit claiming incontestability. *Park 'N Fly* nowhere states that incontestability is automatic after five years of registration.

Also, a mark may have more than adequate secondary meaning pursuant to § 1052(f),[368] and still not be incontestable. The District Court equated secondary meaning with incontestability. This is completely wrong. Although an incontestable mark is presumed to have secondary meaning,[369] a mark with secondary meaning is not presumed to be incontestable. Often an applicant obtains a registration of a descriptive mark because the applicant shows the mark has secondary meaning. This secondary meaning may exist prior to the date of the application. This would occur when a trademark holder fails to register the mark for years and then finally files after many years of customer recognition has been built up. The District Court's reliance on § 1052(f) for the apparent proposition that a mark with secondary meaning is, pursuant to § 1052(f), automatically incontestable is unsustainable in light of the clear language of the statute.

The Tenth Circuit does not consider strength an element of the likelihood of confusion analysis.[370] In *Beer Nuts, Inc. v. Clover Club Foods Co.*,[371] the Tenth Circuit stated that incontestability can be used

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366. *But see supra* note 102.

367. 15 U.S.C. § 1065(3) (1988). *See also supra* notes 104-13 and accompanying text.

368. Section 2(f) states:

> Except as expressly excluded in paragraphs [(a)-(d)] of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's good in commerce. The Commissioner may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.

15 U.S.C. § 1052(f) (1988). Nowhere in this section does the statute equate secondary meaning with incontestability.

369. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 203 (1985).

370. Coherent, Inc. v. Coherent Technologies, Inc., 935 F.2d 1122, 1125 (10th Cir. 1991).

371. 805 F.2d 920 (10th Cir. 1986).

for two purposes: to show validity[372] and to show secondary meaning.[373] As stated previously, it is inconsistent to say that incontestability may not be used to analyze the strength of a mark and, simultaneously, say it may be used to presume secondary meaning. This is because a mark with secondary meaning has at least enough strength to be recognized by the relevant public. According to the definition of strength—the tendency of the mark to identify the goods sold under the mark as emanating from a particular source[374]—secondary meaning and strength are almost synonymous. Therefore, the court's reasoning in *Beer Nuts* is circular and does not clarify the application of incontestability.

11. Eleventh Circuit

Today, the Eleventh Circuit consistently holds that an incontestable mark is a strong mark. In *Dieter v. B. & H. Industries of Southwest Florida*,[375] the court stated that the "incontestable status is a factor to be taken into consideration in the likelihood of confusion analysis. Because Dieter's mark was incontestable, then it is presumed to be at least descriptive with secondary meaning, and therefore a relatively strong mark."[376]

Before *Dieter*, some courts in the Eleventh Circuit used incontestability in their strength of the mark analysis[377] and some did not.[378] Today, courts within the Eleventh Circuit are apparently following the *Dieter* court. In *Burger King Corp. v. Hall*,[379] the court held that the strength of the mark should be determined by incontestability, registra-

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372. *See also* Universal Money Centers, Inc. v. American Tel. & Tel. Co., 17 U.S.P.Q.2d 1435, 1438 (D. Kan. 1990).

373. *Beer Nuts*, 805 F.2d at 924. *See also* Universal Motor Oils Co., Inc. v. Amoco Oil Co., 15 U.S.P.Q.2d 1613, 1618 (D. Kan. 1990).

374. McGregor-Doniger, Inc. v. Drizzle, Inc., 599 F.2d 1126, 1131 (2d Cir. 1979).

375. 880 F.2d 322 (11th Cir. 1989), *cert. denied*, 495 U.S. 928 (1990). Analysis of Eleventh Circuit cases is particularly difficult because courts in this circuit typically use the words "strength" and "type of mark" interchangeably. *See, e.g.*, Ocean Bio-Chem, Inc. v. Turner Network Television, Inc., 741 F. Supp. 1546, 1554 (S.D. Fla. 1990); Gold Kist, Inc. v. ConAgra, Inc., 708 F. Supp. 1291, 1297 (N.D. Ga. 1989); Clayton v. Howard Johnson Franchise Sys., Inc., 730 F. Supp. 1553, 1559 (M.D. Fla. 1988); Rolex Watch U.S.A. v. Canner, 645 F. Supp. 484, 488 (S.D. Fla. 1986).

376. *Dieter*, 880 F.2d at 329.

377. *Clayton*, 730 F. Supp. at 1559.

378. *Gold Kist, Inc.*, 708 F. Supp. at 1297 (court looks to distinctiveness and third party usage of the same or similar mark and consumer recognition of the mark to find a strong trademark); *Rolex Watch U.S.A.*, 645 F. Supp. at 488 (court looks to arbitrariness of the mark to find strong mark); Bell Lab., Inc. v. Colonial Prod., Inc., 644 F. Supp. 542, 545-46 (S.D. Fla. 1986) (court looks to distinctiveness and third party use to determine if mark is strong).

379. 770 F. Supp. 633 (S.D. Fla. 1990).

tion, whether the mark is arbitrary, suggestive or descriptive, and public recognition.

One Florida court's confusion over incontestability is astounding and therefore bears mention. In *Chase Federal Savings & Loan Ass'n v. Chase Manhattan Financial Services, Inc.*,[380] the court found the defendant's mark incontestable,[381] but the court *also* found that the mark did not have secondary meaning.[382] In fact, the court decided "[n]either Plaintiff nor Defendant(s) has acquired as against the other the *exclusive right* to the name 'Chase' through common usage sufficient to obtain ownership of a secondary meaning in the name or mark 'Chase.'"[383] The court resolved the situation by giving each party certain concurrent rights to the mark.[384]

As we have seen, after *Park 'N Fly*, no other court would go so far as to conclude an incontestable registration is invalid because it is merely descriptive.[385] The court in *Chase Federal* either totally misunderstood *Park 'N Fly*, or chose to ignore its clear directive: incontestable marks are now not supposed to be challengeable on grounds of being merely descriptive.[386]

12. Federal Circuit Court of Appeals (FCCA)

The FCCA has not directly concluded whether it considers incontestability a dispositive point when determining a mark's strength.[387] This may, in part, be due to the fact that "strength of the mark" is not expressly enumerated in the FCCA's test for likelihood of confusion. In fact, the cases are so varied on this issue, it is difficult even to speculate on whether a clear rule exists in the FCCA.

Nevertheless,. it appears that the FCCA will not be bothered with incontestability when (or if) it considers a mark's strength or for any other reason. For example, in *G.H. Mumm & Cie v. Desnoes & Geddes,*

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380. 681 F. Supp. 771 (S.D. Fla. 1987).

381. *Id.* at 773.

382. *Id.* at 785.

383. *Id.*

384. *Id.* at 788.

385. Any mark that is a mark and lacks secondary meaning is, by definition, merely descriptive and invalid.

386. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 196-197 (1985).

387. The FCCA has not had much opportunity to do so. There are only five cases since *Park 'N Fly* (1985) where the FCCA addresses incontestable marks. Kenner Parker Toys, Inc. v. Rose Art Indus., Inc., 22 U.S.P.Q.2d 1453 (Fed. Cir. 1992); National Cable Tel. Ass'n, Inc. v. American Cinema Editions, Inc., 937 F.2d 1572, 1581 (Fed. Cir. 1991); G.H. Mumm & Cie v. Desnoes & Geddes, Ltd., 917 F.2d 1292, 1293 (Fed. Cir. 1990); Imperial Tobacco, Ltd. v. Philip Morris, Inc., 899 F.2d 1575, 1575 n.5 (Fed. Cir. 1990); *In re* Merrill Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 1568 (Fed. Cir. 1987).

Ltd.,[388] the court stated that the mark was incontestable but made no mention of that fact when it discussed the mark's fame.[389] Conversely, when the court did address the mark's strength in *G.H. Mumm & Cie*, it totally ignored incontestability.

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388. 917 F.2d 1292 (Fed. Cir. 1990).

389. According to the FCCA, "fame" refers to sales, advertising and length of use of the mark. *Id.* at 1295. All of these would be factors contributing to the strength of the mark in most other circuits.

Misuse of Public Pension Assets: White Collar Crimes and Other Offenses

Ridgeley A. Scott*

Introduction

Shortly after beginning his first term in office, President Eisenhower read several newspaper stories about theft of pension assets. He found there was no federal law protecting the interests of workers, and began a campaign for legislation.[1] The Welfare and Pension Plan Disclosure Act (Disclosure Act)[2] became law in 1958, and was replaced in 1974 by the Employee Retirement Income Security Act (ERISA).[3]

Notice was the main feature of the Disclosure Act. Workers who were aware of problems could sue to prevent further abuse.[4] The laissez-faire approach did not work.

ERISA is a much more ambitious arrangement.[5] ERISA contains general standards for fiduciary conduct and rules limiting or prohibiting specified practices.[6] Those with standing to sue include beneficiaries, employers, trustees, and the Labor Department.[7]

Government plans were exempted from ERISA.[8] Congress did not want to be liable for the uncertain cost of compliance. Arrangements like Social Security and the Federal Civil Service plan complied with the general spirit of the statute. State and local plans were given the

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1. *E.g.*, President's Special Message to Congress on Labor-Management Relations, 1954 Pub. Papers 40 (Jan. 11, 1954).

2. Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (repealed 1974).

3. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1988).

4. *See, e.g.*, International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers v. Daniel, 439 U.S. 551 (1979); Moyer v. Kirkpatrick, 265 F. Supp. 348 (E.D. Pa. 1967), *aff'd*, 387 F.2d 955 (3d Cir. 1968); S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1974-3 (Supp.) C.B. 4; Seth E. Herbert, *Investment Regulation and Conflicts of Interest in Employer-Managed Pension Plans*, 17 B.C. Indus. & Com. L. Rev. 127, 128-29, 149-51 (1976); William J. Isaacson, *Employee Welfare and Pension Plans: Regulation and Protection of Employee Rights*, 59 Colum. L. Rev. 96, 121 (1959).

5. Herbert, *supra* note 4, at 129.

6. 29 U.S.C. §§ 1104(a), 1106(a)(1)(B) (1988).

7. *Id.* § 1132(a).

8. *Id.* § 1003(b)(1).

same treatment for similar reasons. Committees were directed to deliver studies on the cost of compliance by the end of 1976.[9]

Public Employee Retirement Income Security Act (PERISA) proposals were introduced and hearings were held in every year from 1978 through 1984. The proposed bills would have subjected state and local plans to various regulations, including express fiduciary standards. Horrified by the prospect of minimal requirements and the possibility that additional rules might be added later, state and local governments mounted an intense lobbying effort. A parade of witnesses opposed each bill on the ground of increased costs.[10] None of the bills passed either house of Congress.[11] No bills were introduced after 1984.[12]

The cost argument is suspect. The principal cost for pension plans subject to ERISA relates to compliance with a number of antidiscrimination rules.[13] Although opponents complained about costs at great length during ERISA hearings, private plans satisfying ERISA requirements have grown at a steady, substantial rate since ERISA's enactment. Because the PERISA requirements are minimal compared with those of ERISA, it seems clear that there is little or no merit to the cost argument under PERISA. Opponents argued that the cost of compliance was too high because there was no other apparent way to avoid regulation.[14]

Failure to enact PERISA leaves government plans in the same situation private plans were in before enactment of the Disclosure Act in 1958. Executive and legislative officials frequently seek to avoid pension obligations as a means of easing budget problems.[15]

Several general rules are available to deal with the misuse of pension assets. Relief is also available under laws governing breach of employment contracts, including failure to comply with a promise of deferred compensation. Both current and former employees have a cause of action if a government fails to make scheduled contributions

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9. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 360-61 (1974), *reprinted in* 1974-3 C.B. 521-22.

10. *Public Employee Pension Benefit Plan: Hearings Before the Ways & Means Comm.*, 98th Cong., 1st Sess. (1983); H.R. Rep. No. 1138, 98th Cong., 2d Sess. (1984); H.R. Doc. No. 6525, 96th Cong., 1st Sess. (1980); H.R. Doc No. 14138, 95th Cong., 2d Sess. (1978).

11. *See supra* note 10.

12. *Id.*

13. *Id.*

14. *See, e.g., Hearings and Markups on H.R. 2465 and H.R. 6536 Before the Subcomm. on Fiscal & Gov't Affairs Comm.*, 95th Cong., 1st Sess. 7 (1977) (statement of former Rep. Thomas M. Rees).

15. *Id.*

to a pension plan or uses employee contributions for an unauthorized purpose.[16]

Government pension plans are trusts and those with discretion to handle trust affairs are trustees. Trustees of pension plans have three categories of duties: (1) timely collection of employer and employee contributions in full from the government, (2) proper investment of plan assets, and (3) limiting distributions to those approved by the plan. The trustees have a duty to see that funds are collected properly. If the government proposes elimination, reduction, or postponement of contributions due to the plan, and negotiation does not produce timely payment in full, the trustees have a duty to sue to collect.[17] Although a lawsuit may be very disagreeable to those trustees who are friendly with or owe political favors to executive or legislative officials, it is their legal duty to bring suit under these circumstances.

Raiding pension plan assets is another method of relieving budget pressures. Although a trustee's acquiescence in such conduct may preserve friendships and political alliances, civil liability and criminal penalties may be imposed when a trustee facilitates or permits an improper removal of assets.

Trustees also have a duty to obtain reasonable returns from prudent investments.[18] This duty is often disregarded by trustees who allow governments that are unable to borrow from other lenders for a reasonable rate of interest to borrow from government pension plans. Loans of this type are improper under the prudent investor rule, because the amount of interest paid on tax-exempt bonds and similar securities is inadequate under the reasonable return requirement.[19]

Although Congress initially requested a cost study of federal plans, the issue was never addressed. Hence one is forced to conclude that Congress did not really want information about operations like Social Security.[20] While one might infer that there were no problems, it is

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16. *E.g.*, Aikens v. Alexander, 397 N.E.2d 319 (Ind. Ct. App. 1979); *see also* Board of Trustees of the Employees' Retirement Sys. v. Mayor of Baltimore, 562 A.2d 720, 727-29 (Md. 1989); Dadisman v. Moore, 384 S.E.2d 816, 826-28 (W. Va. 1988).

17. *Board of Trustees*, 562 A.2d at 734-37; *See* RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959); GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 541 (rev. 2d ed. 1978); AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 187 (4th ed. 1988).

18. *See, e.g.*, Dadisman v. Moore, 384 S.E.2d 816, 829-32 (W. Va. 1988).

19. Wilkes v. Teachers' Retirement Sys., 447 F. Supp. 1248, 1254-55 (S.D.N.Y. 1978), *aff'd*, 595 F.2d 1210 (2d Cir. 1979); *Hearings and Markups on H.R. 2465 and H.R. 6536 Before the Subcomm. on Fiscal and Gov't Affairs, 95th Cong.*, 1st Sess. 47-48 (1977) (statement of Roy O. Shotland, Georgetown University law professor).

20. *Compare* H.R. CONF. REP. No. 1280, 93rd Cong., 2d Sess. 360-61 (1979), *reprinted in* 1974-3 C.B. 521-22, *with* PENSION TASK FORCE, 95TH CONG., 2D SESS., REPORT ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS (Comm. Print 1978).

much more likely that Congress did not want to absorb the cost of requiring compliance with the new rules and did not want to compile evidence that could be used as the basis for a reform campaign.

The cost of complying with express fiduciary standards is clearly outweighed by its potential benefits. Consider the losses suffered by Social Security due to the wrongful actions or omissions of its trustees. Secretary of the Treasury Henry Morgenthau, Jr., was the managing trustee when he used an incorrect rate of interest to make more money available for other government programs.[21] The discrepancy cost Social Security several billion dollars of interest income between 1939 and 1960.[22]

Public discussion of the problem of protecting Social Security has not been satisfactory. Trustees and advisory councils did not face up to the issue before it was raised in the 1949 Ways and Means Committee report.[23] Although the Ways and Means Committee did discuss the problem in general terms, there was no mention of the cause of the problem and no recommendation for change.[24] These Finance and Conference Committees wanted to bury the topic, so it was omitted from both reports.

Reports during the early and mid-1950s did not address the Social Security problem. Finally, the 1959 Advisory Council recommended that Social Security receive the average rate of interest of all federal obligations,[25] and Congress agreed in 1960.[26] Since the 1960 action caused Social Security to start receiving the rate of interest it had been entitled to since 1939, one question is why did this action take twenty-one years? Another issue is why the government was not sued for several billion dollars of unpaid interest?

The Social Security Administration prepared estimates of future events based on actuarial computations. In every year from its inception through 1957, Social Security had income in excess of expenses. After a loss in 1958, changes were made promptly to eliminate the problem. Over the next twenty-four years, a series of changes in taxation and

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21. *See* S. Rep. No. 1856, 86th Cong., 2d Sess. 28-9 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3636-37.

22. S. Rep. No. 1856, 86th Cong., 2d Sess. 28-29 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3636-37, 3641-42; Advisory Council Report, H.R. Doc. No. 181, 86th Cong., 2d Sess. 72 (1959).

23. *Id.*

24. S. Rep. No. 1699, 81st Cong., 2d Sess. (1950); H.R. Conf. Rep. No. 2771, 81st Cong., 2d Sess. (1950); H.R. Rep. No. 1300, 81st Cong., 2d Sess. 33, 37 (1949), *all reprinted in* 116 U.S. Revenue Acts 1909-50 (B. Reams ed. 1950).

25. Advisory Council Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 71 (1959).

26. S. Rep. No. 1856, 86th Cong., 2d Sess. 28-29 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3636-37.

benefits were designed, in part, to eliminate recurring losses. Although there were some ups, Social Security lost all of its reserves between 1958 and 1983.[27]

Several Advisory Council reports endorsed the methodology used by the Social Security actuaries, and one report even praised their professional competency.[28] Trustees' reports were similar to those of the Advisory Council's.[29] Since the trustees have a statutory duty to report to Congress whenever there is a problem with fund reserves, one can only speculate why the trustees did not obtain an independent second opinion on the Social Security computations. The trustees are personally liable for losses attributable to breach of their fiduciary duty.[30] Therefore, they should have been sued for failure to properly evaluate Social Security's actuarial estimates.

Burned by the insolvency of the Social Security system in 1983, Congress enacted tax rates that produced extra revenue. A precipitous increase in reserves led to charges in 1989 that Congress was using loans from the Social Security trust fund to conceal the true size of the federal deficit. In 1991, Congress refused to enact more reasonable tax rates by a lopsided vote.[31]

Because experience under the Disclosure Act established that people are unlikely to seek redress for wrongful acts,[32] there clearly is a need for a PERISA enforcement provision applicable to all government plans as well as an agency responsible for enforcement. Enforcement could be placed in the hands of an existing department that has a substantial interest in pension matters and is relatively unlikely to bow to political pressure. Labor has not shown much interest in ERISA enforcement problems. The Internal Revenue Service (IRS), which is relatively non-political and has put substantial effort into ERISA enforcement, would be a wiser choice.

We should all keep a particularly watchful eye on regulators of federal pension plans. Representative interest groups such as the American Association of Retired Persons (AARP) and labor unions—as well as private individuals—should have access to an established procedure

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27. H.R. Rep. No. 25, 98th Cong., 1st Sess. 1-2 (1983), *reprinted in* 1983 U.S.C.C.A.N. 219-20; S. Rep. No. 2388, 85th Cong., 2d Sess. 2-3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 4219-20.

28. *E.g.*, Advisory Council Report, H.R. Doc. No. 75, 94th Cong., 1st Sess. 45-51 (1975).

29. Bd. of Trustees, 37th Annual Report, H.R. Doc. No. 150, 95th Cong. 1st Sess. 41-45, 257-63 (1977).

30. *See supra* note 18 and accompanying text.

31. Jeffrey Birnbaum, *Senate Rejects Payroll Tax Cut by Big Margin*, Wall St. J., April 25, 1991, at A2.

32. *See* Herbert, *supra* note 4.

for registering complaints. If this does not produce a satisfactory result, they should have a right to sue.[33] When successful, they should be entitled to recover attorney fees and other legal expenses, and the court should have discretion to award punitive damages against the regulators.

This Article will examine the misuse of assets belonging to federal, state, and local pension plans and the remedies presently available. Since there is an obvious need for express rules and aggressive enforcement, this Article suggests the steps necessary to obtain them. Standards for state and local plans will probably be enacted if representative groups do a good job of lobbying their congressional delegations. Resistance to standards for federal plans makes enactment more uncertain.

I. State and Local Plans

Statutes creating pension funds for government employees typically call for contributions based on quantities of covered employment. Each time a person performs a quantity of covered work, the government must make a fixed contribution to the fund. Many statutes also require additional contributions to sustain the actuarial soundness of the fund. Because both types of payments have been promised as additional compensation for services, timely payment in full is an obligation of the government.[34]

Consider the West Virginia pension plan, enacted in 1961, which established three sources of revenue. Employees contributed a fixed amount of money per unit of covered service, and the employer agency matched those contributions. Any additional amount necessary to maintain actuarial soundness was appropriated by the state from general funds.[35]

The amount necessary to maintain actuarial soundness was computed by the trustees of the program and certified to the governor, who then included the necessary amount in his appropriation bill. The system operated according to plan through fiscal year 1984-85. For that fiscal year, the trustees certified that the fund needed $12 million. The governor requested and the legislature appropriated $12.56 million to the fund.[36]

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33. *Cf.* 29 U.S.C. § 1132(a) (1988 and Supp. II 1990).

34. *E.g.*, Dadisman v. Moore, 384 S.E.2d 816, 821, 826-28 (W. Va. 1989); *In re* State Employee's Pension Plan, 364 A.2d 1228, 1234-35 (Del. 1976); *see generally* Rubin G. Cohn, *Public Employee Retirement Plans—The Nature of the Employees' Rights*, 1968 U. Ill. L. F. 32; Note, *Contractual Aspects of Pension Plan Modification*, 56 Colum. L. Rev. 251 (1956); Note, *Public Employee Pensions in Times of Distress*, 90 Harv. L. Rev. 992, 998-1005 (1977).

35. W. Va. Code §§ 5-10-1, 5-10-13, 5-10-19, 5-10-22, 5-10-29(a)-(b), 5-10-31, 5-10-32 (1987); Dadisman v. Moore, 384 S.E.2d 816 (W. Va. 1989).

36. *Dadisman*, 384 S.E.2d at 821-22.

Contributions from general funds deteriorated after the 1984-85 fiscal year, as illustrated by the following chart:

Year	Trustees	Governor	Appropriated from General Funds	Reverted to General Funds	Received by Plan
1985-86	13,800,000	12,561,966	12,561,966	12,561,966	-0-
1986-87	16,203,000	12,561,966	-0-*	-0-	-0-*
1987-88	13,639,555	-0-	7,544,667	7,544,667	-0-
1988-89	14,250,000	-0-	-0-	-0-	-0-

* Money from certain special funds was to be paid to the plan.[37]

The West Virginia legislature gained confidence after the 1985-86 fiscal year and began taking funds from employer agencies and employees. The 1985-86 budget legislation directed the state highway department to use its contribution money to pay for paving roads. The 1988-89 budget legislation was even more ambitious, putting all contributions from all employer agencies into the general fund and paying part of the health insurance premiums for retirees from employee contributions to the pension plan.[38]

One angry West Virginia retiree sued the governor, legislature, trustees, and various other officials, alleging that the pension trust was not properly funded and was actuarially unsound. Most of the defendants' answers were dilatory, and the plaintiff was upheld on all counts. West Virginia state law had established contractually based property rights in all pension participants who earned contributions from their employers.[39] Hence, the employer contributions wrongfully withheld or diverted were a public debt.[40]

As a substitute for having health insurance premiums for retirees paid from the budgets of the former employer agencies, the legislature provided that retirees' premiums could be paid from pension contri-

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37. *Id.* at 822-23. *Cf.* Weaver v. Evans, 495 P.2d 639, 641-48 (Wash. 1972).

38. *Dadisman*, 384 S.E.2d at 823.

39. *Id.* at 820, 826-29.

40. *Id.* at 832-33; *see also* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977); Valdes v. Corey, 189 Cal. Rptr. 212 (3d Dist. Ct. App. 1983); Dombrowski v. City of Philadelphia, 245 A.2d 238, 244-51 (Pa. 1968); Weaver v. Evans, 495 P.2d 639, 648-50 (Wash 1972).

butions made by employees. This was another violation of the retirement contracts and created another public debt.[41]

Any violation of the funding requirements should support a successful suit. Lowering pension costs was part of the plan to eliminate the 1990 New York budget crisis. Realizing that state pension contributions could not be simply eliminated or modified, the legislature altered the funding formula to reduce the state's 1991 pension fund contribution by approximately $800 million. The change was improper, because the pension plan provided that only the controller could make formula alterations.[42]

States may impair their contractual obligations under limited circumstances. An essential attribute of sovereign power is the ability to alter contract terms. However, when a change is substantial, there should be a careful examination of the nature and purpose of the legislation. One case involved California's refusal to transfer almost $187 million to the state pension fund in an effort to balance the state budget. Loss of $187 million plus long-term investment earnings was substantial, and there was no corresponding benefit to the pension fund. Hence, the impairment was illegal.[43]

Another way to avoid or evade an obligation is to follow the practices of Charles Ponzi.[44] Mr. Ponzi borrowed from many people by telling an amazing story and promising a fabulous rate of interest. Funds from more recent loans were used by Ponzi to cover payments on older loans as they came due. The scheme unraveled when Ponzi could pay only a few cents on the dollar as the number of his loans grew to an unmanageable size. By comparison, some governments provide little or no current funding for pension promises which are so generous that taxes could not be increased enough to pay them.[45]

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41. *Dadisman*, 384 S.E.2d at 829-33; State Teacher's Retirement Bd. v. Giessel, 106 N.W.2d 301, 305 (Wis. 1960).

42. McDermott v. Regan, 587 N.Y.S.2d 532 (N.Y. Sup. Ct. 1992); Barbara Franklin, *Pension Fund Reform*, N.Y.L.J., May 17, 1990, at 5; *Lawmakers Tap Public Pension Funds for $1.2 Billion to Ease Budget Crunch*, BNA Pension Rep., June 4, 1990, at 981; *New York Loses Round on Pension Contributions*, Wall St. J., Aug. 11, 1992, at A11; Sam Verhovek, *States Are Finding Pension Funds Can Be a Bonanza Hard to Resist*, N.Y. Times, April 22, 1990, at § 4 at 8.

43. Valdes v. Corey, 189 Cal. Rptr. 212, 224-26 (3d Dist. Cal. Ct. App. 1983). *See generally* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1, 26-37 (1977).

44. Donald H. Dunn, Ponzi!: The Boston Swindler (1975).

45. Cunningham v. Brown, 265 U.S. 1, 7-9 (1924); *Hearings & Markups on H.R. 2465 and H.R. 6536 Before the Fiscal & Gov't Affairs Comm.*, 95th Cong., 1st Sess. 6 (1977) (statement of former Rep. Thomas M. Rees); H.R. Rep. No. 779, 93d Cong., 2d Sess. 163 (1974). *See generally* Dunn, *supra* note 44.

The main difference between the fraudulent schemes is that the legislators probably will not be indicted.

A trust can be defined as a holding of title to property for the purpose of conserving and protecting it for other persons.[46] An express trust usually involves a formal writing. However, if there is no writing, or the writing does not create an express trust, a trust may be inferred or may result from the circumstances of the particular case.[47] Even if legislation creating a pension fund carefully avoided trust language, the pension fund would still be treated as a trust.

When a contribution is received by a plan, it becomes the property of the trust. Legal title to trust assets is held by the trust, while the beneficiaries hold equitable title. Use of trust property is generally limited to the express purposes set forth in the trust instrument. If the statute creating the pension fund limits it to providing pension benefits for a specified class of people, it is improper to use the assets for any other purpose. Therefore, payment of pension benefits to ineligible persons or payment of health insurance premiums is illegal.[48]

Removing assets for any nonqualified purpose is improper. Public officials who are desperate for money will take anything they think they can get away with. During the 1991 California budget crisis, the enormous state pension plan reserves received great attention. The only question on the legislators' minds seemed to be how to obtain part of the pension fund reserves.[49] There was no apparent concern about the legality of taking property belonging to others. The main difference between robbing a bank at gun point and a legislative raid on a pension fund is that the raid is more likely to have a substantial effect on the lives of a large number of widows and orphans.

There may be different levels of legislative raids. Some states, including West Virginia, seized pension fund assets without any obligation to repay.[50] The California legislative action was not quite as outrageous. In exchange for $1.6 billion, the state offered future benefit increases of equal value. This transaction would have constituted a loan, if there had been an enforceable promise. On the other hand,

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46. Treas. Reg. § 301.7701-4(a) (1986); *see also* Social Security Act of 1935 § 201(a), 49 Stat. 622 (1935); W. VA. CODE § 5-10-3 (1987).

47. BOGERT & BOGERT, *supra* note 17, § 1; SCOTT & FRATCHER, *supra* note 17, § 462.1.

48. BOGERT & BOGERT, *supra* note 17, § 1; SCOTT & FRATCHER, *supra* note 17, § 462.1; *see also In re* State Employee's Pension Plan, 364 A.2d 1228, 1236-37 (Del. 1976); Dadisman v. Moore, 384 S.E.2d 816, 825-26, 830 (W. Va. 1989).

49. *Budget Plans Will Hit PERS*, SACRAMENTO BEE, June 25, 1991, at F1; *California, Pension Fund to Aid State, Hoping to Stall Governor's Control Bid*, WALL ST. J., June 18, 1991, at A3; *U.S. Probe of Wilson's Pension Fight*, S.F. CHRON., June 20, 1991, at A1.

50. Dadisman v. Moore, 384 S.E.2d 816 (W. Va. 1989).

if the offer was a suggestion that legislation[51] would be enacted at a subsequent time, there is no apparent way to distinguish the transactions from a legislative raid.

The payment of interest to pension plans is another important factor. New York required insurance companies to contribute to a reserve fund, and the state promptly began borrowing from the fund without promising to pay interest. Two lower courts found the action of the state to be legal.[52] However, the Court of Appeals held the practice illegal.[53] Because it was improper for the state to borrow trust assets without promising to pay adequate interest, the state was ordered to pay interest.[54]

Trust assets must be exclusively devoted to approved purposes, which are frequently limited to providing pension benefits. It is a breach of trust for a trustee to pay an unqualified benefit or person. Paying health insurance premiums or pension benefits to unqualified people are examples of improper actions by trustees. It is also a breach of trust for the trustee to foster or allow withdrawals from the pension fund by a legislative body for unapproved purposes, such as dealing with state budget problems.[55]

Trustees are required to resist political pressure. When West Virginia withdrew money to pay health insurance premiums, the trustees were cooperative. The court described their actions in language that makes one think the trustees were co-conspirators in a crime.[56] When Governor Wilson sought to withdraw $1.6 billion in exchange for future benefits of equal value, the trustees initially refused. Threats to take control of the pension board led the trustees to agree to the transfer.[57] There is no apparent justification for the action of the California trustees.

Investment policy and practice are additional duties of trustees. Assets may be placed in many different types of investments. One limitation on private plans is the fiduciary standard of ERISA. Under ERISA, fiduciaries must: (1) diversify investments to reduce the risk of large losses, (2) satisfy the prudent investor rule, and (3) act solely

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51. *Assembly Passes Big Tax Package*, S.F. CHRON., June 29, 1991, at A1; *California Budget Talks Continue on Accord to Close Huge Deficit*, WALL ST. J., July 1, 1991, at A10; *Pension Legislation Approved*, L.A. TIMES, June 25, 1991, at A1.

52. *E.g.*, Alliance of Am. Ins. v. Chu, 551 N.Y.S.2d 979 (App. Div. 1990).

53. Alliance of Am. Ins. v. Chu, 571 N.E.2d 672, 681 (N.Y. 1991).

54. *Id.*

55. *In re* State Employees' Pension Plan, 364 A.2d 1228, 1235-36 (Del. 1976); Dadisman v. Moore, 384 S.E.2d 384, 829-31 (W. Va. 1989).

56. *Dadisman*, 384 S.E.2d at 826.

57. *California Pension Fund to Aid State, Hoping to Stall Governor's Control Bid*, WALL ST. J., June 18, 1991, at A3; U.S. Probe of Wilson's Pension Fight, S.F. CHRON., June 20, 1991, at A1.

in the interest of the participants and beneficiaries. Because state and local government plans are exempt from ERISA,[58] their investment practices are governed by the law of trusts.

ERISA requirements are similar to those of the law of trusts. Diversification has always been required at some point. Fiduciaries are required to exercise a reasonable amount of care and judgment. Leading textbooks and some organized groups, such as the American Law Institute, have spent a considerable amount of time evaluating exactly what is required or permitted by those rules.[59]

The duty of loyalty requires trustees to act solely in the interest of the beneficiaries.[60] Therefore, the fiduciary cannot directly or indirectly profit from his or her position. Leading textbooks extensively examine various types of improper conduct.[61] The duty of loyalty is not limited to prohibiting monetary gain from the trustee position. Even where there is no potential for improper profit, several authorities hold that pension trustees must act solely in the interest of the beneficiaries.[62] Expectations and results are frequently quite different.[63]

Consider the approach of the Kansas trustees. In an effort to boost the economy, the trustees instituted local investment programs in 1973. By the mid-1980s, about $200 million, or ten percent of fund was invested in Kansas real estate, and another ten percent was invested in Kansas companies. The trustees made those investments despite not having any in-house experts on those types of investments.[64]

The standard for business loans was conservative. Borrowers had to be "relatively substantial, seasoned, and in sound financial condition" in order to obtain a loan.[65] Pressure from Governor Carlin led to the easing of the loan restrictions in 1985. Loans were thereafter

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58. 29 U.S.C. §§ 1104(a), 1003(b)(1), 1002(32) (1992). *See generally* Note, *Fiduciary Standards and the Prudent Man Rule Under the Employment Retirement Income Security Act of 1974*, 88 HARV. L. REV. 960 (1975).

59. BOGERT & BOGERT, *supra* note 17, §§ 612-13, 671, 706; SCOTT & FRATCHER, *supra* note 17, §§ 174-174.1, 228-228.1, 230.3; *see also* RESTATEMENT (THIRD) OF TRUSTS §§ 227-29 (1992).

60. BOGERT & BOGERT, *supra* note 17, §§ 543-543V; SCOTT & FRATCHER, *supra* note 17, §§ 170-170.25.

61. BOGERT & BOGERT, *supra* note 17, §§ 543-543V; SCOTT & FRATCHER, *supra* note 17, §§ 170-170.25.

62. BOGERT & BOGERT, *supra* note 17, §§ 543-543V; SCOTT & FRATCHER, *supra* note 17, §§ 170-170.25.

63. BOGERT & BOGERT, *supra* note 17, §§ 543-543V; SCOTT & FRATCHER, *supra* note 17, §§ 170-170.25.

64. *Picking Losers, Back-Yard Investing Causes Losses, Rocks Kansas Pension Plan, But Idea Still Has Appeal*, WALL ST. J., Aug. 21, 1991, at A1 [hereinafter *Picking Losers*].

65. *Id.*

made to new and expanding Kansas businesses unable to obtain credit elsewhere. Similar investments were made outside Kansas in an effort to entice companies to move operations into the state. Money was lent to ventures which included a steel mill, a savings and loan institution, a video store chain, a high technology company and a food distributor.[66]

A newspaper article entitled "Picking Losers" was published. During a legislative investigation, Ronald Peyton, president of Callan Associates, the chief investment adviser to the fund, stated that "the . . . underlying theme at the time was rah-rah, gung-ho, we're going to help Kansas."[67] When asked why he did not do more to curb risky investments, Mr. Peyton replied that when "the locomotive is coming down the track, you don't throw yourself in front of the train."[68] In another newspaper article entitled "The Land of Oz,"[69] the chairman of the legislative investigation stated that the "thing that boggles the mind is the extent to which there was failure after failure after failure of the system."[70]

The courts will be busy for years with claims of civil and criminal mismanagement of the Kansas pension fund. Already, one criminal complaint alleged that a defendant committed seven counts of securities fraud during placement of a loan. More proceedings are in the works.[71] The trustees have hired a team of investigators and lawyers.[72] Suit has been filed against an investment firm and more lawsuits will likely follow.[73] Apparently, there will be many claims against professionals, such as lawyers and bankers.[74]

Some of the problems in the Kansas plan involved more than mere mismanagement. The biggest single loss was $65 million, which resulted from the collapse of Home Savings Association. Loans to Home Savings Association were made at the urging of Michael Russell, who was appointed as Chairman of the Board of Trustees by Governor Carlin. Chairman Russell subsequently received a $40 million business loan from Frank Morgan, who controlled Home Savings. Russell and Morgan

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Land of Oz: Kansas Pension Scandal Like Bad Dream*, ST. LOUIS POST DISPATCH, Oct. 7, 1991, at 23 [hereinafter *Land of Oz*].

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.; see also Scandal Rocks Kansas State Employee's Pension Fund*, CHARLOTTE OBSERVER, Oct. 13, 1991, at 10B; *SEC Insider Trading Change*, WICHITA BUS. J., July 2, 1990, at § 1, p. 3; *see generally* Mertens v. Hewitt Associates, 948 F.2d 607 (9th Cir. 1991), *on remand sub nom*, Mertens v. Kaiser Steel Retirement Plan, 1992 U.S. Dist. LEXIS, 10770 (N.D. Cal.), *cert. granted*, 113 S. Ct. 49 (1992).

denied any connection between the two loans. Charges that Robert Stephen, attorney general under Governor Carlin, delayed an inquiry into pension fund activities led to the appointment of a special prosecutor.[75] Ironically, the acronym for the name of the Kansas plan is CAPERS.[76]

Other pension funds suffered losses from direct placement of funds in targeted investments. A 1989 survey by the Institute for Fiduciary Education included questionnaires to the 126 largest public funds. Of the ninety-nine public systems responding, forty-one reported having made economically targeted investments.[77]

Another approach of desperate politicians is to borrow money from a plan when the government is not credit-worthy. For example, after emerging from the Great Depression, New York City enjoyed several years of relative financial health. The city established a rainy day fund and made substantial contributions to the fund for several years. However, in 1965, New York City Mayor Robert Wagner could not balance the city's budget, despite the use of several suspect accounting practices.[78]

In 1966, Wagner was replaced by John Lindsay, who thereafter sought state approval for city tax increases. Mayor Lindsay greatly appealed to voters, but he did not understand the politics of doing business with state and city officials or with constituents such as municipal labor unions. This administration suffered when the mayor advocated a tax increase and failed to close deals with various other people.[79]

Because NY state law required a balanced budget, budget gimmicks multiplied. Devices included suspending contributions to the city's rainy-day fund, spending the existing balance in the rainy-day fund, and delaying contributions to several municipal pension plans. Political pressures and a weak mayor led to overestimation of future revenue

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75. *Land of Oz, supra* note 69; *Picking Losers, supra* note 64.

76. *Id.*

77. *Joint Economic Committee Hearing*, 94th Cong., 2d Sess. 134 (1976) (statement of Edward M. Kirshner); INST. FOR FIDUCIARY EDUC., ECONOMICALLY TARGETED INVESTMENTS: A REFERENCE FOR PUBLIC PENSION FUNDS 1 (1989); *see generally Doing Homework Closer to Home*, L.A. TIMES, Sept. 11, 1989, § 2, at 4; Virginia Ellis, *Firms Pick Up Tab for State Pension Officials*, L.A. TIMES, Sept. 8, 1989, at 1; *Institute Gets $35,000 for Fund Survey, Pensions & Investment Age*, L.A. TIMES, April 3, 1989, at 19.

78. CHARLES R. MORRIS, THE COST OF GOOD INTENTIONS: NEW YORK CITY ON THE LIBERAL EXPERIMENT, 1960-1975 22, 136-37 (1980).

79. *Id.* at 26, 28-29. *See generally* WALLACE S. SAYRE & HERBERT KAUFMAN, GOVERNING NEW YORK CITY: POLITICS IN THE METROPOLIS (1965); WALLACE S. SAYRE, NEW YORK CITY AND THE STATE IN PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE (1967).

and underestimation of spending. The series of incorrect budget projections created a budget problem too large to be ignored.[80]

In 1974, Abraham Beame replaced Lindsay. Beame, a former budget director and controller for a number of years, may have understood city finances better than any previous incoming mayor. However, the financial problems were so great that Beame was unable to save the city from practical bankruptcy. Financial institutions, investors and federal, state and city officials did not want the city to go through bankruptcy proceedings, so they created several devices to deal with New York's problems.[81]

Part of the recovery plan included additional investments by several municipal pension plans. In the early 1960s most of these plans ceased investing in city bonds for financial reasons. By late 1975, the New York teachers' plan had about seventeen percent of its assets in city bonds. As the city's financial crisis intensified, the trustees faced substantial political pressure to increase the investment. The trustees were opposed, because they knew that the bonds were unmarketable and prospects for financial recovery by the city were dim. President Ford opposed federal aid because New York did not know what it was doing with its money. Trustees for pension plans outside of the city felt that it was improper for their funds to invest in city bonds for the same reason.[82]

An independent investigation led the trustees to conclude that the city probably would be forced into bankruptcy without assistance from the teachers' fund, and that event would threaten the solvency of the fund. Contributions from the city were the teachers' fund largest source of revenue, and they would cease if all city revenue were devoted to essential services and bondholders. Faced with this dilemma, the trustees refused to invest further until they obtained approval of various provisions designed to secure maximum protection of the beneficiaries. The teachers' fund invested $860 million in city bonds, thereby increasing its holdings to thirty-seven percent of plan assets by the middle of 1978.[83]

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80. MORRIS, *supra* note 78, at 131-32. *See also* Malcolm S. Forbes, Jr., *New York City's Dire Financial Straits*, FORBES, Nov. 1, 1974, at 23.

81. ROBERT W. BAILEY, THE CRISES REGIME: THE MAC, THE EFCB, AND THE POLITICAL IMPACT OF THE NEW YORK CITY FINANCIAL CRISES 3, 16-46, 74-75 (1984); *New York's Last Gasp?*, NEWSWEEK, Aug. 4, 1975, at 18.

82. Wilkes v. Teachers' Retirement Sys., 447 F. Supp. 1248, 1255 (S.D.N.Y. 1978), *aff'd*, 595 F.2d 1210 (2d Cir. 1979); BAILEY, supra note 81, at 68; *New York's Last Gasp?*, NEWSWEEK, Aug. 4, 1975, at 18; *Why New York City Won't Make It Financially*, BUS. WK., Aug. 18, 1975, at 94.

83. *Wilkes*, 447 F. Supp. at 1251-55, 1258.

Several beneficiaries sued alleging that the purchase of such a large quantity of unmarketable and highly speculative bonds violated the prudent investor rule and the duties of diversification and undivided loyalty. The court indicated that the purchase would have been improper if the city's potential bankruptcy had not been a factor. The purchase of the bonds by the teachers' fund was approved because the trustees had properly concluded it was the only means of maintaining the solvency of the fund. The decision was limited to the unique circumstances and has been described as a political decision.[84]

Philadelphia suffered a similar fate. Years of fiscal irresponsibility were capped off by the administration of Mayor Wilson Goode, who led the city to the brink of bankruptcy. Unable to borrow in the marketplace, the city turned to the fire and policemen's pension fund. The trustees grudgingly agreed to cooperate. An attempt to enjoin the purchase of city bonds by the pension fund was rejected on the ground that there was no breach of fiduciary duty.[85]

Suggestions that cases of this sort present unique circumstances unlikely to occur again are difficult to accept. Whenever politicians are desperate for money, they will take it from any source. Hence loans from pension funds will continue if trustees of governmental plans feel they will not be penalized. The New York and Philadelphia decisions tend to encourage this type of conduct.[86]

Low-interest loans are another gimmick. Trustees are obligated to obtain a reasonable rate of return on trust assets. One commentator has observed that although tax-exempt bonds may be great for investors in high tax brackets, their low interest rate makes them a disaster for tax-exempt plans. Hence, the only apparent reason for buying tax-exempt bonds is to benefit the issuer, and placing an investment in tax-exempt bonds is a breach of the trustee's duty of loyalty.[87]

II. Interest Rates and Social Security

After World War I, the federal government was embarrassed by its wealth. There were record surpluses, and tax rates were reduced

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84. *Id.* at 1255-56, 1259; Marc Gertner, *Fiduciary Responsibility of Public Employee and Employer Representatives*, 6 J. of Pension Plan. & Compliance 83, at 94 (1980). *Cf.* Sgaglione v. Levitt, 337 N.E.2d 592, 375 N.Y.S.2d 79 (N.Y. 1975).

85. Philadelphia Lodge No. 5, Fraternal Ord. of Police v. Philadelphia Bd. of Pensions and Retirement, No. 5224 slip op. at 9 (Dec. Term, 1990) (Phila. Common Pleas 1991), *appeal dismissed* 606 A.2d 603 (Pa. Commw. Ct. 1992).

86. *Hearings and Markups on H.R. 2456 and H.R. 6536 Before the Subcommittee on Fiscal and Gov't Affairs*, 95th Cong., 1st Sess. 47-48 (1977) (statement of Roy O. Shotland, Georgetown law professor). *See generally* Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 Harv. L. Rev. 992 (1977).

87. *Hearings*, *supra* note 86, at 47-48; Bogert & Bogert, *supra* note 17, § 824; Scott & Fratcher, *supra* note 17, § 240.

four times during the 1920s. Unfortunately, the Great Depression ended that. Revenues declined as tax rates increased, and increasing deficits forced Congress to search for additional means of raising money to combat the Depression. Anti-tax avoidance hearings were held in 1933, while Congress borrowed additional funds to cover shortfalls.[88]

President Roosevelt wanted to increase government spending. Unemployment relief was one of his early goals, so he asked Congress for additional federal employment, a broad public works program, and grants to the states. Studies developed in connection with grants accentuated the scope of the problem in terms of people who needed help and the cost of providing it.[89]

In Roosevelt's 1934 State of the Union address, he pledged continued unemployment relief. In another message that June, he called for security for individuals and families, and an Economic Security Committee was created to suggest methods for dealing with misfortunes. A report in January of 1935 recommended various measures including mandatory old age annuities, and offered a draft bill.[90]

The original program was not ambitious. Half of all workers in the nation were not covered due to various exclusions. The original program was financed by taxes on employers and employees. The maximum annual contribution was $60 per employee. Because the tax was scheduled to start in 1937 but benefits would not begin until 1942, a substantial reserve was to be created.[91]

The original financing plan would not have produced enough revenue. Relatively few people would retire in the early years of the system and the original plan called for Federal Insurance Contribution Act (FICA) tax revenue to be considerably greater than disbursements during

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88. *E.g.*, WAYS & MEANS SUBCOMM. ON METHODS OF PREVENTING THE AVOIDANCE & EVASION OF THE INTERNAL REVENUE LAWS, PRELIMINARY REPORT, 73d Cong., 2d Sess. (1933), *reprinted in* 100 U.S. Revenue Acts 1909-1950 (B. Reams ed. 1979); ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR ENDED JUNE 30, 1928, H.R. DOC. No. 137, 71st Cong., 2d Sess. 32 (1929).

89. Three Essentials for Unemployment Relief, 1933 PUB. PAPERS 80 (March 21, 1933). *See generally id.* at 107, 183, 202, 237, 246, 249, 308, 361, 454, 533.

90. REPORT OF THE COMMITTEE ON ECONOMIC SECURITY, H.R. DOC. No. 81, 74th Cong., 1st Sess. 38-46 (1935); Annual Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration, 73d Cong., 2nd Sess. at 7 (Jan. 3, 1934); *see generally* S. REP. No. 628, 74th Cong., 1st Sess. 2-3 (1935), *reprinted in* 101 U.S. Revenue Acts 1909-1950 (B. Reams ed. 1979); J. DOUGLAS BROWN, AN AMERICAN PHILOSOPHY OF SOCIAL SECURITY 3-24 (1972).

91. H.R. Doc. No. 4120, 74th Cong., 1st Sess. §§ 301-02, 7 (4-6), 404-05 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 9, 25-27, 31 (1935), *reprinted in* 101 U.S. REVENUE ACTS 1909-1950 (B. Reams ed. 1979).

the first twenty years. The Old Age fund would have been in a deficit position by 1965, followed by large and increasing deficits until 1980. Hence, a portion of the benefits due after 1965 would have to be paid out of general revenue.[92]

President Roosevelt insisted on a program which would be entirely self-supporting until 1980. A new rate schedule was developed to meet this goal. One result of this change was the creation of a much larger surplus in the first twenty years. Appropriations equal to the amount required to fund future social security payments were added to the Old Age Reserve Account. By the middle of 1939, the account had a balance of $1.18 billion.[93]

Money not required for current withdrawals was invested in securities issued or guaranteed by the government. Government obligations could be acquired on original issue at par or by purchase for the market price. Paper issued to the unemployment trust fund had to bear interest at the average rate for all government obligations issued in the previous month. Investments purchased had to have a rate of return at least equal to the average. When the average was not equal to one-eighth of one percent, it was to be rounded to the next lower eighth. Debt issued to the Old Age Reserve Account was to bear a three percent interest rate, and investments purchased had to yield at least that rate. The fixed minimum facilitated actuarial computations which were based on tables bearing three percent interest compounded annually.[94]

Use of the funds was suspect. Although one goal was to avoid loss of principal, another was to obtain the use of a large quantity of cash to finance general operations of the government. The reserve could have been invested to obtain a much better return from other sources without undue risk.[95]

Republicans distrusted most of President Roosevelt's programs, and their 1936 presidential platform complained about the size and handling

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92. Edwin E. Witte, The Development of the Social Security Act 146-49 (1962). *See generally* A. Altmeyer, The Formative Years of Social Security (1968); Roy Lubove, The Struggle for Social Security 1900-1935 (2d ed. 1986).

93. Witte, *supra* note 92, at 149-52; Fourth Annual Report of the Social Security Board, 1939, H.R. Doc. No. 610, 76th Cong., 3d Sess. 210 (1940). *Cf.*, Comm. on Econ. Security, Report, H.R. Doc. No. 81, 74th Cong., 1st Sess (1935). *See generally* Brown, *supra* note 90, at 179-93.

94. Social Security Act of 1935 §§ 201(b), 904(b), 49 Stat. 622, 641 (1935) (current version at 42 U.S.C. § 401 (1992)); H.R. Rep. No. 615, 74th Cong., 1st Sess. 9, 19, 35 (1935), Comm. on Econ. Security, Report, H.R. Doc. No. 81, 74th Cong., 1st Sess. 16 (1935).

95. *See generally* Bond and Stock Yields: 1857-1970, Historical Statistics of the United States, H.R. Doc. No. 78, 93d Cong., 1st Sess., pt. 2, at 1003 (1974).

of reserves. A Republican congressional group studied the issues. Finance responded by establishing an Advisory Counsel consisting of representatives of employers, labor, and the public. The report was prepared late in 1938 when the nation was still in the grips of the Depression, and many of the proposals were designed to boost public confidence in the system.[96]

Appropriations to the reserve were equal to the amount needed for full funding under accepted actuarial principles. The goal was to obtain enough money in the fund at any given time to pay all of the liabilities accrued to that time. Full funding was desirable for private plans, because they might terminate at any time. Since a government plan presumably would continue forever, a reserve adequate to avoid the need for emergency taxes was considered sufficient. Republicans approved of a reserve that was adequate to cover expenses for a few years. This change resulted in the abandonment of scheduled tax increases and the rejection of a Democratic plan for the government to bear an equal part in the cost of benefits.[97]

Originally, the Treasury Department held FICA collections as part of general revenue. Appropriation of all or part of general revenue required Congressional action. The Advisory Council recommended a permanent appropriation so that all receipts would automatically be credited to the Old Age fund. Congress adopted this proposal.[98]

Republicans were not satisfied with the Treasury account and argued for a separate trust fund. The Advisory Council members thought that a trust fund should be dedicated exclusively to the payment of benefits

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96. H.R. REP. No. 728, 76th Cong., 1st Sess. 113-14 (1939) (supplemental views of the Republican minority), *reprinted in* 105 U.S. REVENUE ACTS 1909-1950 (B. Reams ed. 1979); ADVISORY COUNCIL, FINAL REPORT, S. DOC. No. 4, 76th Cong., 1st Sess. 1-2 (1939). *See generally* COMM. ON ECON. SEC., REPORT, H.R. DOC. No. 110, 76th Cong., 1st Sess. 11-12 (1939), *reprinted in* 105 U.S. REVENUE ACTS 1909-1950 (B. Reams ed. 1979); *Republican Platform, Plank 4*, *reprinted in* N.Y. TIMES, June 12, 1936, at 1; Representatives Jenkins and Reed, Senators Townsend and Vandenberg, Joint Statement of Explanation (1937), *reprinted in* RESERVES UNDER FEDERAL OLD-AGE BENEFIT PLAN - SOCIAL SECURITY ACT: FINANCE COMM. HEARING, 75th Cong., 1st Sess. 15-19 (1937); BROWN, *supra* note 90.

97. *Compare* S. REP. No. 628, 74th Cong., 1st Sess. 31 (1935), *reprinted in* 101 U.S. REVENUE ACTS 1909-1950 (B. Reams ed. 1979) *with* S. REP. No. 734, 76th Cong., 1st Sess. 15 (1939). *See generally* H.R. REP. No. 728, 76th Cong., 1st Sess. 113 (1939) (supplemental views of Republican minority), *all three reprinted in* 105 U.S. REVENUE ACTS 1909-1950 (B. Reams ed. 1979); ADVISORY COUNCIL, FINAL REPORT, S. DOC. No. 4, 76th Cong., 1st Sess. 24-25 (1939); COMM. ON ECON. SEC., REPORT, H.R. DOC. No. 110, 76th Cong., 1st Sess. 12 (1938).

98. Social Security Act of 1935 § 201(a), 49 Stat 622 (1935) (current version at 42 U.S.C. § 401 (1992)); S. REP. No. 734, 76th Cong., 1st Sess. 16, 41 (1939), *reprinted in* 105 U.S. REVENUE ACTS 1909-1950 (B. Reams ed. 1939); ADVISORY COUNCIL, FINAL REPORT, S. DOC. No. 4, 76th Cong., 1st Sess. 6 (1939).

and that the trustees should act solely for the beneficiaries. Congress created a trust fund with the Secretary of the Treasury serving as the managing trustee. The trustee's general investment duties were limited to supervision of the fund and making reports to Congress.[99]

Congress modified the investment practices of the Old Age fund. The three percent rule was dropped in favor of an average approach, because there was no need to compute a full funding contribution. Unlike the unemployment trust fund where the statute was silent, the Old Age Trust could not invest in average obligations unless the managing trustee found that purchasing general obligations would be contrary to the public interest. Republicans argued that the managing trustee would favor the government when making investment decisions, because his investment duties were not limited to protecting the interests of beneficiaries and because the managing trustee was also the chief financial officer of the government.[100]

Some Republican concerns were justified. Interest on average obligations was supposed to have been the average rate of interest on all federal obligations. However, Henry Morgenthau, Jr., Secretary of the Treasury and managing trustee, fixed the interest rate at the average rate of interest for federal coupon obligations, which was typically more than one percent less than the average rate of interest on all federal obligations.[101] The lower rate of interest was used to allow the government to spend more on other programs.

Several 1950 modifications illustrate the lack of congressional respect for the Old Age Trust. In 1944, advocates of government contributions won a minor victory when the statute was amended to authorize appropriations from general revenue funds to finance benefits. This change was not mentioned during congressional hearings or in House and Senate reports, and the Conference Committee report merely stated that general revenue funds could be contributed to the trust. No appropriation was ever made under the general revenue provision before it was repealed in 1950 on the ground that FICA revenue and interest on the reserve should entirely support the trust.[102]

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99. H.R. Rep. No. 728, 76th Cong., 1st Sess. 33-34 (1939), *reprinted in* 105 U.S. Revenue Acts 1909-1950 (B. Reams ed. 1979); Advisory Council, Final Report, S. Doc. No. 4, 76th Cong., 1st Sess. 6-7, 26 (1939); Social Security Act of 1939, § 201(a)-(b), 53 Stat. 1362 (1939) (current version at 42 U.S.C. § 403 (1992)).

100. H.R. Rep. No. 728, 76th Cong., 1st Sess. 15, 34 (1939), *id.* at 113 (supplemental views of the Republican minority), *both reprinted in* 105 U.S. Revenue Acts 1909-1950 (B. Reams ed. 1979). *Compare* Social Security Act of 1935, § 904(b), 49 Stat. 642 *with* Social Security Act of 1939 § 201(c), 53 Stat. 1363.

101. Social Security Act of 1939 § 201(c), 53 Stat. 1363. *E.g.*, S. Rep. No. 1856, 86th Cong., 2d Sess. 28-29 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3636-37.

102. Revenue Act of 1943 § 902 (1944), H.R. Conf. Rep. No. 1079, 78th Cong.,

Appropriations to the trust fund included all FICA taxes, interest, and penalties, which required IRS accounting for collections. Beginning in 1951, the amount payable was calculated by applying the tax rates to taxable wages reported by employers. Finance observed that the change would help reduce administrative costs. The Conference Committee instructed Treasury to pass the savings on to the Social Security system. Unfortunately, any benefit in the form of lower administrative expenses may have been more than offset by the reduction in revenue.[103]

By the end of 1949, the fund's reserve had grown to $11.2 billion, and Ways and Means began responding to complaints about investments. Some Committee members complained that it was improper for the government to spend the money for general government purposes. This argument was rejected based upon an analogy to investments by insurance companies. Others thought people would be taxed twice for a single benefit. The report denied the claim by applying the argument to a single year in which benefit payments exceeded FICA revenue by $100 million. If the trust held government bonds, interest financed by taxes would cover all or a portion of any shortfall. If the trust did not hold government bonds, $100 million of revenue would be needed to cover the shortfall and another $100 million would be needed to pay interest to the bondholders.[104]

The last answer is suspect because it assumes either that there is no surplus FICA revenue or that any surplus would be nonproductive. The absence of surplus revenue is unlikely because Congress demanded a surplus large enough to cover estimated expenses for a few years. It is equally improbable that several billion dollars would not generate any earnings. Strangely enough, no one complained about the 2 1/8% rate of return on average obligations. During the same period other government insurance programs, including the civil service retirement system, earned three percent to four percent interest on loans to the government.[105] One can only speculate why Social Security received a

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2d Sess. 89 (1944), *both reprinted in* 110 U.S. REVENUE ACTS 1909-50 (B. Reams ed. 1979); S. REP. No. 1669, 81st Cong., 2d Sess. 4, 34-34 (1950), *reprinted in* 116 U.S. REVENUE ACTS 1909-1950 (B. Reams ed. 1979). *Contra*, ADVISORY COUNCIL, REPORT, S. DOC. No. 149, 80th Cong., 2d Sess. 13, 45-46 (1948). *See generally* BROWN, *supra* note 90.

103. S. REP. No. 1669, 81st Cong., 2d Sess. 121-23 (1950), H.R. CONF. REP. No. 2771, 81st Cong., 2d Sess. 111 (1950), *both reprinted in* 116 U.S. Revenue Acts 1909-1950 (B. Reams ed. 1979).

104. H.R. REP. No. 1300, 81st Cong., 1st Sess. 36-37 (1949), *reprinted in* 116 U.S. REVENUE ACTS 1909-1950 (B. Reams ed. 1979). *Cf.* ADVISORY COUNCIL, REPORT, S. DOC. No. 149, 80th Cong., 2d Sess. 45-46 (1948).

105. H.R. REP. No. 1300, 81st Cong., 1st Sess. 33, 37 (1949), *reprinted in* 116

much lower rate of interest on government loans and why no one objected to the different treatment. Social Security presumably could have received at least a four percent rate of return on other investments without undue risk.

Major legislation had always begun with an administration bill, and there were significant changes in 1950, 1952, and 1954. Complaints about investments began to increase again, and the 1955 trustees report added a new point to the 1949 arguments. The trust should not purchase obligations issued by competitive business because such obligations are not proper investments for government. The administration did not offer a bill, and the Chairman of Ways and Means developed a secret bill which was passed by the House seven days after it was introduced.[106]

This secret bill proposed an Advisory Council to oversee the financial progress of Social Security. It also provided for the Secretary of Health, Education, and Welfare to appoint a group of twelve people to represent workers, employers and the public before each scheduled tax increase. The group would review the financing of the Old Age Trust funds in relation to long-term commitments of the program. The report of the Council would be included in the trustee's annual report to Congress[107]

One member of Ways and Means Committee was not satisfied. A few weeks after the secret bill was passed, Congressman Bill Jenkins introduced a bill with more provisions regulating investment practices. An express authorization to issue obligations to the trust fund was designed to emphasize that these obligations were as much a part of the public debt as other federal undertakings. This point was reinforced by changing the designation of the obligations from special obligations to public debt obligations. The existing law did not mention maturities. Purchases had been periods of five years or less. The bill called for maturities fixed with due regard for the needs of the trust. The managing trustee interpreted the "due regard" language to require a maturity date of five years or more.[108]

U.S. Revenue Acts 1909-1950 (B. Reams ed. 1979); H.R. Rep. No. 728, 76th Cong., 1st Sess. 14-15 (1939), *reprinted in* 105 U.S. Revenue Acts 1909-1950 (B. Reams ed. 1979). *See generally* Bond and Stock Yields: 1857-1970, Historical Statistics of the United States, H.R. Doc. No. 78, 93d Cong., 1st Sess., pt. 2, at 1003 (1974).

106. Bd. of Trustees, 15th Annual Report, S. Doc. No. 39, 84th Cong., 1st Sess. 7-8 (1955); Letter from Secretary Hobby to Chairman Cooper (June 22, 1955), H.R. Rep. No. 1189, 84th Cong., 1st Sess. 58-62 (1955); H.R. 7225, 84th Cong., 1st Sess. (1955).

107. H.R. Rep. No. 1189, 84th Cong., 1st Sess. 10-11, 35-36 (1955). *See generally* Bd. of Trustees, 19th Annual Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 31-34 (1959).

108. Advisory Council Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 70 (1959); H.R. Doc. No. 7770, 84th Cong., 1st Sess. § 101(a) (1955).

Other changes were more substantial. Congressman Jenkins was a member of Ways and Means in 1949, and he remembered the low interest rate on average obligations. Interest rates were based on the average interest rate of all marketable federal securities. To reflect the fact that Social Security was a long-term investor, obligations due or callable in five years or less were excluded from the average computation. If the average was not a multiple of one-eighth of one percent, it was rounded to the next lower multiple. The new approach was to round to the nearest multiple. Excluding short term obligations from rate calculations increased revenue by approximately $80 million dollars per year. Nothing was said about the consequence of modifying the method of rounding.[109]

Average obligations could be purchased only when marketable securities were not in the public interest. The managing trustee interpreted this to mean that marketable securities should be purchased only when they would produce a higher yield.[110] Ways and Means did not take any action on the Jenkins bill. The Eisenhower Administration approved of the contents of the Jenkins bill during Finance Committee hearings, and it was incorporated into the Senate version of the secret bill.[111] All of the proposals were enacted in 1956.

By the end of 1959, the reserve had grown to $20.5 billion. Comparative investment returns on the fund did not change significantly between 1949 and 1959. During 1959, about ninety percent of the fund's assets were invested in average obligations, at interest rates of 2 1/2% and 2 5/8%.[112] The average interest rate was based upon the average interest rate for coupon bonds, which was frequently was more than one percent less than the rate for all marketable government securities.[113] The only apparent reason for using the lower interest rate was to reduce the government's interest expense.

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109. *Social Security Amendments of 1955: Hearings Before the Senate Finance Comm.*, 84th Cong., 2d Sess. 1239 (1956) (statement of Marion B. Folsom, Secretary of Health, Education, and Welfare); H.R. Doc. No. 7770, 84th Cong., 1st Sess. § 101(a) (1955).

110. *Social Security Amendments of 1955: Hearings Before the Senate Finance Comm.*, 84th Cong., 2d Sess. 1230-34 (1956) (statement of Marion B. Folsom, Secretary of Health, Education, and Welfare); Advisory Council Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 72 (1959); S. Rep. No. 2133, 84th Cong., 2d Sess. 14-15, 49 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3891-92, 3926; H.R. Doc. No. 7770, 84th Cong., 1st Sess. § 101(a) (1955).

111. *Social Security Amendments of 1955: Hearings Before the Senate Finance Committee*, 84th Cong., 2d Sess. 1230-34 (1956).

112. Advisory Council Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 70-71 (1959); *see also* Bd. of Trustees, 20th Annual Report, H.R. Doc. No. 352, 86th Cong., 2d Sess. 13 (1960).

113. S. Rep. No. 1856, 86th Cong., 2d Sess. 28-29 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3636-37.

Three considerations suggest that the lower interest rate constituted improper management of Social Security funds. First, other federal programs, such as the Railroad Retirement fund were guaranteed at least a three percent interest rate on their average government investments.[114] Second, marketable government securities were paying up to a four percent interest rate.[115] Third, a return of more than four percent could have been obtained without undue risk.[116]

Altering the interest rate paid on investments leads to some remarkable figures. For example, increasing the interest rate from 2 5/8% to 3% on the entire fund in 1959 would have produced about $77 million in additional interest income annually; from 2 5/8% to 3 5/8% would have yielded $205 million, and from 2 5/8% to 5% would have generated $486 million. The $486 million increase would have been more than 54% of the total 1959 FICA revenue of $895 million.[117] Although using the coupon rate in 1959 saved the government $205 million in interest expense, the possible loss to Social Security from government investments was far greater. If the entire Social Security fund had been invested in private issues at 5%, the increase in 1959 interest income would have been $486 million.

Complaints about investment practices continued to escalate. The 1959 Advisory Council report supported limiting investments to government securities, and added two new points to the 1955 arguments. Purchasing obligations of competitive businesses might lead to unfortunate financial or political consequences for the Social Security system, and investing in obligations of state and local governments would unnecessarily involve the funds in affairs entirely apart from Social Security.[118]

The major complaint was that the rate of return was not satisfactory. In early 1959, the average coupon rate was 1 3/8% less than the average return for all long term marketable government securities. The Advisory Council argued that the rate received by Social Security should be "as nearly as possible equal"[119] to that received by long

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114. *See, e.g.*, BD. OF TRUSTEES, ANNUAL REPORT, RAILROAD RETIREMENT BOARD, 1959, H.R. DOC. NO. 267, 86th Cong., 2d Sess. 8 (1960).

115. S. REP. NO. 1856, 86th Cong., 2d Sess. 28-29 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3636-37.

116. *See* H.R. Rep. No. 961, 87th Cong., 1st Sess. 2-3 (1961); BD. OF TRUSTEES, 20TH ANNUAL REPORT, H.R. DOC. NO. 352, 86th Cong., 2d Sess. 13 (1960); ADVISORY COUNCIL REPORT, H.R. DOC. NO. 181, 86th Cong., 1st Sess. 70-71 (1959).

117. BD. OF TRUSTEES, 20TH ANNUAL REPORT, H.R. DOC. NO. 352, 86th Cong., 2d Sess. 15 (1960).

118. ADVISORY COUNCIL REPORT, H.R. DOC. NO. 181, 86th Cong., 1st Sess. 68-70 (1959).

119. *Id.* at 71.

term investors, and recommended that the average required return be based on quotations for all marketable securities maturing more than five years after the date of issuance.[120]

Conflict of interest charges were side-stepped by the Advisory Council. When the statute first authorized an average in 1939, some Republicans complained that the Secretary of the Treasury might favor the government over the trust fund. Although the statute called for an average interest rate based on all marketable government securities, Secretary Morgenthau used the much lower average interest rate for coupon bonds. As a result, Social Security made low-interest loans to the government for twenty-one years, although congressional opponents continually complained about improper investments by a series of Treasury Secretaries.[121]

The Social Security system incurred substantial losses due to investments made at low interest rates. A total of $5 billion in interest income was received between 1937 and 1959.[122] However, the trust would have made an additional substantial additional income if it had received the proper rate of interest.

The Advisory Council recommended that the average rate of interest for most obligations be based on an investment period of more than five years. The Council suggested a lower rate of interest for short term investments. However, the board of trustees thought two different averages would be an unnecessary burden and proposed a single three year investment period. Ways and Means recommended a single interest rate with a four-year investment period.[123]

Rules for deciding what to purchase were modified. The 1956 statute required purchasing marketable securities unless they were not in the public interest. The Secretary interpreted this to mean that the trusts could purchase marketable securities only if they provided a higher rate of return. The 1959 Advisory Council thought that obtaining a higher rate of return should be a statutory duty and recommended that the average be required on all trust investments unless marketable

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120. S. Rep. No. 1856, 86th Cong., 2d Sess. 28-29 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3636-37; Advisory Council Report on Social Security Financing, H.R. Doc. No. 181, 86th Cong., 1st Sess. 71 (1959).

121. Advisory Council Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 70 (1959); H.R. Rep. No. 728, 76th Cong., 1st Sess. 113-14 (1939) (supplemental views of the Republican minority), *reprinted in* 105 U.S. Revenue Acts 1909-1950 (B. Reams ed., 1979); Social Security Act of 1939 § 201(c), 53 Stat. 1363 (1939) (current version at 42 U.S.C. § 403 (1992)).

122. Advisory Council Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 58 (1959).

123. H.R. Rep. No. 1799, 86th Cong., 2d Sess. 27 (1960); Bd. of Trustees, 19th Annual Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 32-33 (1959).

was both in the public interest and resulted in no loss of income.[124]

Investment policy was to be subject to regular oversight. Although the experience and position of the Secretary of the Treasury made him the best person to be managing trustee, the Advisory Council thought that the board should be responsible for reviewing general policies and recommending changes. The Board was scheduled to meet at least once every six months. Advisory Councils were scheduled to meet every three years.[125] Ways and Means thought this was unnecessary in light of the expanded duties of the Board, so it proposed a Council meeting every five years beginning in 1966. With the exception of the average investment period, Congress enacted the changes recommended by the Advisory Council.[126]

III. Actuarial Problems and Social Security

Actuarial criteria were developed for Social Security. Information was evaluated under standards established and regularly revised by the Social Security Administration. When expenses exceeded income, a small negative figure was not considered significant because of "certain elements of conservatism" and the variability of long range estimates. Congress adopted 0.25% as an acceptable variance of actuarial balance. Thus, if expenses did not exceed revenue by more than 0.25% of taxable payroll, the system was considered in actuarial balance.[127]

Results were acceptable from 1937 through 1957 when revenue always exceeded disbursements. Hence, things like economic conditions and lack of actuarial balance did not cause any problems. However, 1958 disbursements exceeded revenue by 0.25%, and Ways and Means and Finance both projected that disbursements would continue to exceed revenue in each year through 1965. The committees proposed a package of increased benefits, earnings base, and tax rates to stop this trend.[128]

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124. Advisory Council Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 71-72 (1959).

125. S. Rep. No. 1856, 86th Cong., 2d Sess. 28-29, 33-34 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3636-37, 3641-42.

126. Advisory Council Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 72 (1959); *see also* S. Rep. No. 1856, 86th Cong., 2d Sess 28-29, 33-34, (1960), *reprinted in* 1960 U.S.C.C.A.N. 3636-37, 3641-42.

127. *E.g.*, S. Rep. No. 409, 89th Cong., 1st Sess. 123 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2066; Bd. of Trustees, 24th Annual Report, H.R. Doc. No. 236, 88th Cong., 2d Sess. 51-53 (1964); Social Sec. Admin. Actuarial Study No. 53 (1961); *see generally* Social Sec. Admin., Economic Assumptions Underlying the Medium-Range Projections of the Federal Old Age and Survivor's Insurance and Disability Insurance Trust Funds 1966-1975 (1961).

128. S. Rep. No. 2388, 85th Cong., 2d Sess. 2-3, 5-8 (1958), *reprinted in* 1958 U.S.C.C.A.N. 4219-20, 4222-25. *See generally* S. Rep. No. 1856, 86th Cong., 2d Sess. 37 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3645.

The actuarial situation was approved by the 1959 Advisory Council. It studied demographic and other assumptions and the basic techniques used in estimating short- and long-range costs. The Advisory Council concluded that the assumptions provided a reasonable basis for making forecasts and that the estimating techniques were sound. Because expenses exceeded income by only 0.25%, the 1958 program was in close actuarial balance. The Advisory Council concluded by recommending there should be no change in the contribution schedule.[129]

The actuarial system had broken down. The 1958 loss of $216 million was followed by 1959 and 1960 losses of $1.271 billion[130] and $713 million,[131] respectively. Politics moved to the center stage during the 1960 presidential campaign. Even though there was every reason to believe that the program would continue to produce substantial losses, Congress and the President agreed to increase benefits without increasing taxes. The actuarial deficiency decreased slightly from 0.25% to 0.24%,[132] probably due to an increase in the interest received by the fund. After the election, the new Congress promptly prepared a bill to increase benefits and revenues. Expenses under the 1961 program were expected to exceed income by 0.24%.[133]

Results varied under the 1961 program. The years 1961, 1964, and 1965 produced gains of $72 million, $760 million, and $482 million, while 1962 and 1963 produced losses of $1.274 billion and $687 million, respectively. In sum, the fund lost a total of $2.849 billion during the period from 1958 through 1965. The Board was unsure of the situation, and repeatedly emphasized that the system was in actuarial balance under the 0.25% standard.[134]

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129. Advisory Council Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 60-61, 73 (1959).

130. Bd. of Trustees, 20th Annual Report, H.R. Doc. No. 352, 86th Cong., 1st Sess. (1959).

131. Bd. of Trustees, 21st Annual Report, H.R. Doc. No. 60, 87th Cong., 1st Sess. 1 (1961).

132. S. Rep. No. 425, 87th Cong., 1st Sess. 11 (1961).

133. S. Rep. No. 404, 89th Cong., 2d Sess. 128 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2071; S. Rep. No. 425, 87th Cong., 1st Sess. 11 (1961), *reprinted in* 1961 U.S.C.C.A.N. 1866; Bd. of Trustees, 21st Annual Report, H.R. Doc. No. 60, 87th Cong., 1st Sess. 1 (1961); Bd. of Trustees, 20th Annual Report, H.R. Doc. No. 352, 86th Cong., 2d Sess. 8 (1960); Bd. of Trustees, 19th Annual Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 10 (1959).

134. Bd. of Trustees, 26th Annual Report, H.R. Doc. No. 392, 89th Cong., 2d Sess. 1 (1966); Bd. of Trustees, 25th Annual Report, H.R. Doc. No. 100, 89th Cong., 1st Sess. 1, 29 (1965); Bd. of Trustees, 24th Annual Report, H.R. Doc. No. 236, 88th Cong., 2d Sess. 1, 51-53 (1964); Bd. of Trustees, 23rd Annual Report, H.R. Doc. No. 80, 88th Cong., 1st Sess. 1, 30-31 (1963); Bd. of Trustees, 22nd Annual Report, H.R. Doc. No. 346, 87th Cong., 2d Sess. 1 (1962).

After a detailed examination, the 1965 Advisory Council approved of the actuarial situation. The only significant change suggested was modification of the period for estimating long range costs. The period had been forever, and seventy-five years was considered a more realistic time. The seventy-five year rule made a closer actuarial balance desirable, but the Council did not offer a specific limit. The 1965 Act increased benefits and revenue and adopted a new standard for excess expenses. The system would be considered in actuarial balance if expenses did not exceed income by more than 0.1% of taxable payroll.[135]

Things improved during the next several years. The 1966 loss of $308 million was followed by a 1967 gain of $3.643 billion. Several noteworthy changes were introduced in the 1967 Act. Although Advisory Councils had reported only on financial conditions, future Councils were to review all aspects of Social Security. Reports were due every four years beginning in 1971. Benefits and revenue increased and expenses exceeded income by only 0.05%. Hence, the system was considered to be in actuarial balance, and Finance estimated the fund would increase by $36.158 billion during the 1968-72 period. Although there was an actual gain in each year, the $12.884 billion increase for the entire period was only about one-third of the estimate.[136]

Substantial differences between estimates and actual results led to several changes. The 1971 Advisory Council appointed a panel of actuaries and economists to examine the assumptions and methods used by Social Security. Previous estimates had assumed level earnings. Since earnings in fact go up, the panel felt that the estimates should conform with reality. The panel also recommended that benefits keep pace with changes in prices. Hence, benefits and the contribution and benefit base should automatically increase with the cost of living.[137]

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135. Advisory Council Report, H.R. Doc. No. 100, 89th Cong., 1st Sess. 66-68 (1965); S. Rep. No. 404, 89th Cong., 1st Sess. 132 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2075. *Compare* Bd. of Trustees, 25th Annual Report, H.R. Doc. No. 100, 89th Cong., 1st Sess. 29-30 (1965) *with* 26th Annual Report, H.R. Doc. No. 392, 89th Cong., 2d Sess. 37 (1966).

136. 33d Annual Report, H.R. Doc. No. 130, 93d Cong., 1st Sess. 5 (1973). The 1967 estimate does not seem to have been materially altered by legislation in 1969 and 1971. H.R. Conf. Rep. No. 42, 92d Cong., 1st Sess. 3 (1971), *reprinted in* 1971 U.S.C.C.A.N. 976; H.R. Conf. Rep. No. 782, 91st Cong., 1st Sess. 344 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2460; H.R. Rep. No. 700, 91st Cong., 1st Sess. 4 (1969); 28th Annual Report, H.R. Doc. No. 288, 90th Cong., 2d Sess. 12 (1968); Bd. of Trustees, 27th Annual Report, H.R. Doc. No. 65, 90th Cong., 1st Sess. 12 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 103, 9, 26, 39-42 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2937, 43, 60, 73-76.

137. Advisory Council Report, H.R. Doc. No. 80, 92d Cong., 1st Sess. 90, 95-103 (1971).

Prior estimates were an average of high and low estimates. The panel concluded that a best estimate derived from a single set of assumptions would produce results closer to actual experience. In addition, the panel suggested using a series of varying situations in order to show how the best estimate would be affected if experience differed from the major assumptions. The goal of the estimates was to produce enough revenue to cover actual expenses and maintain a fund approximately equal to one year of benefit payments. The panel called for substantial reductions in short-term tax rates if the changes were adopted.

The Advisory Council accepted the recommendations of the panel,[138] and the panel's recommended changes were enacted in 1972. The 1972 Act increased benefits and the contribution and benefit base, and both could be increased automatically to account for changes in the cost of living. Short-term estimates assumed a gradual increase in earnings, while long-range projections continued to be based on level earnings.[139]

This new arrangement made actuaries even more uncertain. The 1973 trustees' report repeatedly emphasized the imponderables of estimating future events and the likelihood that 1974 expenses would exceed income by 0.32%. Nonetheless, the trustees did not propose any financing changes.[140] Several months later, Ways and Means expressed concern and concluded that a basic review of financing was overdue. The Committee directed early creation of the next Advisory Council and ordered an independent review by the Ways and Means staff.[141]

The 1974 trustees' report created even more concern. Remarks about imponderables were repeated and the size of the deficit increased dramatically to 2.98%. Although some change in income or expenses was needed, the 1974 trustees' report declined to offer specific recommendations until the Advisory Council completed its work.[142] The 1975 Council report stated that the alternative to a substantial tax increase

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138. Advisory Council Report, H.R. Doc. No. 80, 92d Cong., 1st Sess. 65-67, 72-73, 95-103 (1971).

139. Public Debt Limit-Extension, Pub. L. No. 92-336, §§ 201-2, 86 Stat. 408-15 (1972); *see* H.R. Conf. Rep. No. 1215, 92d Cong., 2d Sess. 2 (1972); S. Rep. No. 1230, 92d Cong., 2d Sess. 135, 339-44 (1972), *reprinted in* 48 U.S. Revenue Acts 1953-72 (B. Reams ed. 1985); Fin. & Ways & Means Comm., 92d Cong., 2d Sess. Summary of Social Security Amendments of 1972, 34-35 (Comm. Print 1972).

140. Bd. of Trustees, 33d Annual Report, H.R. Doc. No. 130, 93d Cong., 1st Sess. 16, 32-33 (1973).

141. H.R. Rep. No. 627, 93d Cong., 1st Sess. 5-6 (1973), *reprinted in* 1973 U.S.C.C.A.N. 3181-82; *see also* S. Rep. No. 553, 93d Cong., 1st Sess. 73 (1973).

142. Bd. of Trustees, 34th Annual Report, H.R. Doc. No. 313, 93d Cong., 2d Sess. 34-38 (1974).

in 1976 was a decline in fund revenues of several billion dollars per year.[143] The 1975 trustees' report noted that the deficit increased dramatically to 5.32%, leading the trustees to endorse the Council's recommendations.[144]

Congress was skeptical about the need for a substantial tax increase. Ways and Means began the process of investigating the issue by directing the Subcommittee on Social Security to hold the first public hearings on financing the system. Several hundred pages of testimony was received in the spring of 1975.[145] While Congress considered the situation, the trustees became even more concerned. The trustees' 1976 report described the problem in considerable detail and stated that the fund would be exhausted by 1984 under the intermediate estimate.[146] The 1977 report included a similar description and advanced the exhaustion date to 1983.[147]

Results for the period illustrate the degree of actuarial inefficiency. Finance found in 1972 that income would exceed expenses by 0.01%, but Congress estimated that the fund would grow by $16.03 billion during the next five years.[148] Although there were gains in the first three years, losses during the last two years produced a $102 million net loss for the five-year period. This loss was intentionally understated. Since the closing figure for 1976 was $925 million more than the opening figure for 1977, actual net loss was $1.027 billion.[149] Even though there were several warnings about the need for a quick increase in income,[150] Congress did not act until 1977.

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143. ADVISORY COUNCIL REPORT, H.R. DOC. No. 75, 94th Cong., 1st Sess. 47-51, 57-63 (1975).

144. BD. OF TRUSTEES, 35TH ANNUAL REPORT, H.R. DOC. No. 135, 94th Cong., 1st Sess. 36, 41-45 (1975).

145. *Financing the Social Security System: Hearings Before the Ways and Means Subcommittee on Social Security*, 94th Cong., 1st Sess. 1 (1975).

146. BD. OF TRUSTEES, 36TH ANNUAL REPORT, H.R. DOC. No. 505, 94th Cong., 2d Sess. 21-59 (1976).

147. BD. OF TRUSTEE, 37TH ANNUAL REPORT, H.R. DOC. No. 150, 95th Cong., 1st Sess. 1-4, 42-60 (1977).

148. FIN. & WAYS & MEANS COMM., 92D CONG., 2D SESS., SUMMARY OF SOCIAL SECURITY AMENDMENTS OF 1972, 34-35 (Comm. Print 1972); S. REP. No. 1230, 92d Cong., 2d Sess. 344 (1972), *reprinted in* 48 U.S. REVENUE ACTS 1953-72 (B. Reams ed. 1985).

149. *E.g.*, BD. OF TRUSTEES, 33D ANNUAL REPORT, H.R. DOC. No. 130, 93d Cong., 1st Sess. 5 (1973); *compare* 37TH ANNUAL REPORT, H.R. DOC. No. 150, 95th Cong., 1st Sess. 8 (1977) *with* 38TH ANNUAL REPORT, H.R. DOC. No. 336, 95th Cong., 2d Sess. 9 (1978). The 1973 legislation did not materially affect the actuarial situation. H.R. REP. No. 627, 93d Cong., 1st Sess. 12, 17 (1973), *reprinted in* 1973 U.S.C.C.A.N. 3188, 3193.

150. *E.g.*, BD. OF TRUSTEES, 37TH ANNUAL REPORT, H.R. DOC. No. 150, 95th Cong., 2d Sess. 9 (1977).

Ways and Means found that the method of computing automatic increases in benefits and the contribution and benefit base accounted for half of the deficit. The remainder resulted from a combination of factors, including higher-than-estimated inflation and unemployment and lower-than-estimated fertility and real growth. Changes were designed to "restore financial soundness . . . by eliminating the actuarial deficit . . . through the first decade of the next century."[151] It is doubtful that Ways and Means believed that. The medium-range estimate was for income to exceed expenses by 0.84%, but the long-term figure was a negative 1.33%. The Committee also adopted a provision authorizing Social Security to borrow from general revenue if the fund fell below a certain level.[152]

The plan was not accepted. The Social Security Administration felt a slight positive actuarial balance was preferable, and Finance designed a package under which income would always exceed expenses. The medium-range number was 0.84%, and the long range figure was 0.04%. The Committee estimated that there would be losses in 1978 and 1979, followed by gains in the years 1980 through 1983, and the net growth of the fund for the six-year period was estimated at $12.2 billion. Because there was no need for the authority to borrow from general revenue, the provision was deleted.[153]

Conference preferred the Ways and Means approach. The medium-range estimate was for income to exceed expenses by 0.79% and a long-range number was a of negative 1.26%, and the fund would be exhausted in 2029. This result and the fact that the committees wanted a National Commission to study Social Security financing suggests that neither Ways and Means nor the Conference believed the projections.[154]

The period from 1977 through 1983 was remarkably similar to the period from 1972 through 1977. The 1978 Board of Trustee's report observed that the 1977 amendments would eliminate the short- and medium-range annual deficits beginning in 1981 and that income would exceed expenses by 1.02% for the medium range. However, there would be a long-range deficit of 1.4%. The report concluded that the amendments had restored "financial soundness . . . throughout the remainder

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151. H.R. Rep. No. 702, 95th Cong., 1st Sess. 2, 6-7, 17, 57 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4155, 4159.

152. H.R. Rep. No. 702, 95th Cong., 1st Sess. 2, 6-7, 17, 57 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4159, 4163-64, 4174, 4214.

153. S. Rep. No. 372, 95th Cong., 1st Sess. 51, 55-57 (1977).

154. Bd. of Trustees, 38th Annual Report, H.R. Doc. No. 336, 95th Cong., 2d Sess. 46-47 (1978); H.R. Conf. Rep. No. 837, 95th Cong., 1st Sess. 74 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4320.

of this century."[155] There was no material difference in the 1979 report.[156]

The 1979 Advisory Council may have been more cautious. The fund declined from seventy-three percent of annual outlays in 1974 to twenty-nine percent in 1979, and the report carefully examined the actuarial situation. The Council found that the underlying assumptions were reasonable and that the methodology used to make financial projections was sound. Although the arrangements were generally approved, there remained a need for a more systematic approach to known relationships between the assumptions. The Council concluded that the intermediate and long-range projections in the 1979 Board report were sound[157]

Although the medium- and long-range outlooks in 1980 had not changed materially from those of 1978 and 1979, the short-range picture was different. Under one approach, the fund would be insolvent and unable to pay benefits in late 1981 or early 1982. After the short-term deficits there would be substantial surpluses. The report also stated that revised projections would probably be necessary when data reflecting the 1980 recession became available.[158]

The National Commission on Social Security identified a basic problem with the actuarial assumptions. Since about 1900, wages had regularly increased at a rate greater than benefits. Social Security estimates assumed that this relationship would continue. Consequently, benefits were automatically adjusted upward for changes in the Consumer Price Index, but wages were in fact rising more slowly than prices. The Board's 1981 final report called for higher revenue and suggested that the fund maintain a balance equal to approximately one year's expenses.[159]

A few months later, the 1981 Board report did a nearly complete reversal. The discussion of actuarial status was more detailed and included a pair of intermediate estimates. The medium-range figures were a surplus of 0.30% and a deficit of 0.31%. The long-range numbers were deficits of 1.61% and 2.44%. The short-term situation was critical. Every alternative approach predicted that the fund would run out of

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155. Bd. of Trustees, 38th Annual Report, H.R. Doc. No. 336, 95th Cong., 2d Sess. 2-3 (1978).

156. Board of Trustees, 39th Annual Report, H.R. Doc. No. 101, 96th Cong., 1st Sess. 3 (1979).

157. Advisory Council Report, Ways and Means Comm. Pt. No. 45, 96th Cong., 1st Sess. 31, 45, 48 (Comm. Print 1980).

158. Bd. of Trustees, 40th Annual Report, H.R. Doc. No. 332, 96th Cong., 2d Sess. 3-4 (1980).

159. Nat'l Comm'n on Social Sec., Final Report 55-56, 65 (1981).

money in the latter half of 1982 and that expenses would continue to exceed income until at least 1985. Prompt legislative action was needed to strengthen short-term financing.[160] Congress responded by giving the fund the authority to borrow until the end of 1982.[161]

Lack of actuarial efficiency is illustrated by the decline in the fund. During the period from 1937 through 1957, the balance increased every year, because income exceeded disbursements each year. The fund grew steadily from a zero balance to more than $23 billion in 1957. There were various ups and downs between 1957 and 1983. The fund reached almost $40 billion by the middle of 1975, but it was exhausted by the end of 1982. Thus, the fund had to use its authority to borrow money in order to pay current benefits in 1983. In addition to not receiving interest on reasonable balances, the fund had to pay interest on borrowed money.[162]

Congress dealt with these problems early in 1983. Funds for payment of current benefits were assured by continuation of the authority to borrow, and the deficit was to be eliminated by a tax increase and by limiting benefit increases.[163] This solution was effective, and the fund steadily grew from 1984 through 1990 when the balance exceeded $203 billion.[164]

The existence of a large and growing fund gave rise to a movement to reduce the Social Security tax. Senator Daniel Patrick Moynihan complained that the money loaned to the government was being used for general expenses. Congress used the fund as a device to conceal the true size of the federal deficit. He argued that if Congress wants to spend more, it should finance additional expenditures with revenue from other sources or additional taxes.[165]

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160. Bd. of Trustees, 41st Annual Report, H.R. Doc. No. 66, 97th Cong., 1st Sess. 2, 57-71 (1981).

161. H.R. Conf. Rep. No. 409, 97th Cong., 1st Sess. 9-11 (1981), *reprinted in* 1981 U.S.C.C.A.N. 2681-83.

162. H.R. Rep. No. 25, 98th Cong., 1st Sess. 1 (1983), *reprinted in* 1983 U.S.C.C.A.N. 219; 37th Annual Report, H.R. Doc. No. 150, 95th Cong., 1st Sess. 8-9 (1977); Bd. of Trustees, 19th Annual Report, H.R. Doc. No. 181, 86th Cong., 1st Sess. 19 (1959).

163. H.R. Rep. No. 25, 98th Cong., 1st Sess. 65-66 (1983), H.R. Conf. Rep. No. 47, 98th Cong., 1st Sess. 132-33 (1983), *both reprinted in* 1983 U.S.C.C.A.N. 284-85, 422.

164. Bd. of Trustees, 51st Annual Report, H.R. Doc. No. 88, 102d Cong., 1st Sess. 24 (1991).

165. Michael Arndt, *Effort to Trim Social Security Tax Gaining*, Chi. Trib., Jan. 16, 1991 at 1; Dale Russakoff, *Say It Again, Pat*, Wash. Post, Jan. 18, 1990, at A21; *The Payroll Tax Hoax*, San Diego Union, April 2, 1991, at B-6; George F. Will, *The Social Security Surplus Scam*, Wash. Post, Jan. 11, 1990, at A23.

Senator Moynihan also noted a need to stimulate the economy. Lowering the tax on employees would put more spending money in the hands of consumers. Slashing the tax on employers would reduce the cost of goods and services. These events would create more jobs and stimulate other benefits. Both the economy and Social Security would have been winners under the reduction plan. Revenue from a million new jobs would have increased Social Security income by more than $2 billion a year.[166]

Social Security was removed from deficit computations in 1990,[167] and opponents of the Moynihan plan argued that reducing the tax would increase the deficit.[168] Even if a debt is not included in deficit computations, it will still have to be paid sooner or later. Thus, the only reason for removing Social Security from deficit calculations must have been to minimize the figures announced to the people who were unaware of the dishonest method of accounting.

Opponents suggested that reducing contributions would weaken the financial integrity of the Social Security system.[169] President Bush even argued that the change might result in bankruptcy.[170] These complaints have no apparent connection to reality. No one seriously suggested a need for reserves exceeding expenses of the current year, and even if they had, the reserve was equal to disbursements of one and one-half years in 1991.[171] So long as the reduced rates maintained a reserve at least as great as the expenses for one year, there should not be a

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166. The lowest rates under the proposal were 5.2% on employers and employees for 1996-2009. If the new workers averaged $20,000 a year under the 1996 rates, the fund would receive $2,04 million from them and their employers. 137 CONG. REC. 5579-82 (daily ed. Jan. 14, 1991) (statement of Sen. Moynihan); Alex Prud'homme, *The Common Man's Tax Cut*, TIME, April 1, 1991, at 28; Paul Roberts, *Worker's bondage to the tax collector*, WASH. TIMES, April 18, 1991, at G3.

167. Omnibus Budget Reconciliation Act of 1990 § 13,301, 104 Stat. (1990); H.R. CONF. REP. No. 964, 101st Cong., 2d Sess. 1160-61 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2865-66.

168. Donald Lambro, *Social Security More Likely To Be Cut*, WASH. TIMES, Feb. 1, 1991, at A4; Tom Wicker, *The Party of April 15*? N.Y. TIMES, April 17, 1991, at A23. *See generally Budgetary Treatment of Federal Trust Funds: Hearing Before the Legislation and Nat'l Security Subcomm. of the Gov't. Operations Comm.*, 101st Cong., 1st Sess. 27-33 (1989) (statement of Rep. Butler Derrick); *id.* at 33-51 (statement of Rep. William Alexander); *id.* at 90-104 (statement of Isabel V. Sawhill, Senior Fellow, Urban Institute); *id.* at 104-16 (statement of Carolyn L. Weaver, Dir., Social Security & Pension Project, American Enterprise Inst. for Public Policy Research).

169. Jeffrey Birnbaum, *Sen. Mitchell Proposes Cut in Payroll Tax*, WALL ST. J., Feb. 7, 1991, at A6.

170. President's Letter to congressional Leaders on Social Security, 27 WEEKLY COMP. PRES. DOC. 492 (April 23, 1991).

171. BD. OF TRUSTEES, 51ST ANNUAL REPORT, H.R. DOC. No. 88, 102d Cong., 1st Sess. 24 (1991).

short-term financial crisis. The highest rates allowed under current law are 6.2% for 1990 and all subsequent years.[172] The reduction plan had several higher rates for later years, including 8.1% beginning in 2050. Therefore, the reduction plan was a better bet to provide long-term stability.[173]

Regardless of the merits of the reduction plan, the Senate rejected it by a lopsided vote in April of 1991. Senator Moynihan said that he felt unable to push the plan again in 1991, and the reduction plan has not been resurrected to date.

IV. The Public Employee Retirement Income Security Act (PERISA)

Assets of public plans may be misused by legislators, trustees, or the two acting in concert. Many legislators and trustees seem to be unaware of the legal status of public plans and the potential consequences of misusing assets.[174] Because remedies for misconduct are primarily based on common law and equitable principles,[175] there may be substantial differences from one jurisdiction to another. A uniform set of express rules would ameliorate the problems caused by rules which are indefinite or inconsistent.

When ERISA was being considered early drafts included government plans. Federal funds, including Civil Service and Social Security, and funds of state and local governments would have been covered. Suggestions that compliance would be very expensive led to an exemption for government plans and a study of the cost.[176] Subsequent proposals to regulate state and local plans were called PERISA.

The original version of PERISA was rudimentary in comparison to ERISA.[177] Many duties applicable to private arrangements were not imposed on state and local government plans. Horrified at the prospect

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172. I.R.C. §§ 3101(a), 3111(a) (West Supp. 1991); 137 Cong. Rec. 5579-82 (daily ed. Jan. 14, 1991) (statement of Sen. Moynihan). *See generally Read His Lips*, New Republic, Feb. 12, 1990, at 7.

173. Jeffrey H. Birnbaum, *Senate Rejects Payroll Tax Cut by Big Margin*, Wall St. J., April 25, 1991, at A2.

174. *E.g.*, *Picking Losers, supra* note 64; Joyce Terhaar, *Budget Plans Will Hit PERS*, Sacramento Bee, June 5, 1991, at § F, p. 1.

175. H.R. Rep. No. 533, 93d Cong., 1st Sess. 4-5 (1973), *reprinted in* 1974-73 C.B. 213-14.

176. *Compare* H.R. Rep. No. 533, 93d Cong., 2d Sess. 18 (1973), *reprinted in* 1974-3 C.B. 227 (1974) *with* 29 U.S.C. §§ 1002(32), 1003(b)(1) (Supp. II 1990). *See generally* H.R. Rep. No. 779, 93d Cong., 2d Sess. 17, 163 (1974), *reprinted in* 1974-3 C.B. 260, 406; H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 360 (1974), *reprinted in* 1974-3 C.B. 521.

177. H.R. Doc. No. 6525, 96th Cong., 1st Sess. (1980); H.R. Doc. No. 14138, 95th Cong., 2d Sess. (1978).

of minimal requirements and the specter of additional rules which might be added at later times, state and local governments mounted an intensive lobbying effort.[178]

Several witnesses testified during hearings on the original proposal. Most were representatives of state and local governments who argued that PERISA would unnecessarily increase pension costs. Like the ERISA opponents, opponents to PERISA preferred being able to do whatever they wanted without interference.[179]

Proposals were introduced and hearings were held in every year from 1978 through 1984. Each time, a parade of witnesses opposed the bill for reasons which had no apparent merit except for a desire to maintain the status quo. None of the bills were passed by either House of Congress, and no bill was introduced after 1984.[180]

There are two likely reasons for the success of the opposition. First, Congress may never have been particularly interested in regulating governmental plans. Second, Congress may have yielded to pressure from state and local political colleagues. These two possibilities suggest that state and local employee groups did not express adequate interest in PERISA to their Congressional delegations.

Suggestions that potential costs would have outweighed prospective benefits requires examination.[181] The principal cost for plans under ERISA is compliance with the anti-discrimination rules. Without the specific requirements for things like participation, accrual of benefits, and vesting, and the general requirement that contributions or benefits be non-discriminatory, the cost of compliance with ERISA would be minimal. Although opponents complained about the cost of compliance at great length during ERISA hearings private pension plans under ERISA have actually continued to grow at a substantial rate. Because PERISA requirements are minimal in comparison to those of ERISA,[182] one should suspect that there is little or no merit to the cost arguments.

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178. *E.g.*, *Hearings on Public Employee Retirement Income Security Act of 1980: House Comm. on Ed. & Labor*, 96th Cong., 2d Sess. 159-73 (1980) (statement of James Krivitz, representing Nat'l Assn. of Counties).

179. *E.g.*, *id.* at 141 (statement of Robert J. Egan, Ill. State Senator, and Chairman of Ill. Public Employees Commission).

180. *E.g.*, *Hearings on Public Employee Retirement Income Security Act of 1982: House Comm. on Ed. & Labor*, 97th Cong., 2d Sess. 351 (1982) (statement of James Clark, Jr., President of Md. State Senate & Chairman of Pensions Comm. of Nat'l Conference of State Legislators, representing Nat'l Governors Assoc.).

181. *E.g.*, *Hearings & Markups on H.R. 2456 and H.R. 6536 Before the Fiscal & Gov't Affairs Comm.*, 95th Cong., 1st Sess. 6-7 (1977) (statement of former Rep. Thomas M. Rees).

182. *E.g.*, *Hearings on Public Employee Retirement Income Security Act of 1980: House Comm. on Ed. & Labor*, 96th Cong., 2d Sess. (1980) (text of bill).

In fact, cost was probably argued because there was no other way to avoid regulation. One can only speculate why Congress accepted the argument.

Congress has never been interested in regulating Social Security. Although Congress ordered a study on the cost of compliance, no study has actually dealt with the issue.[183] While there have been several proposals to regulate state and local plans, no one has introduced a bill covering Social Security or other federal plans. Congress believes that federal plans comply with the general spirit of ERISA, and it does not want to finance any costs of complying with specific rules.

The need for regulation of all government plans has been discussed. This Article has examined the affirmative acts and omissions of the Secretary of the Treasury and other trustees of the Social Security system and the misconduct of legislators and trustees of state and local plans.[184] There is no question that there is a need for regulation and that the potential good stemming from regulation far outweighs the costs.

Many of the subjects that might be covered by PERISA are beyond the scope of this Article. Topics such as discrimination and vesting have nothing to do with the misuse of assets. However, other matters such as fiduciary conduct and funding are relevant.[185]

As an illustration of the deficiencies in private retirement plans, consider the experience of the Studebaker Motors Co. In many important respects—including participation, accrual of benefits, and vesting—the Studebaker plan was very favorable to employees. However, when Studebaker went out of business, many unsuspecting employees discovered that their dreams of a secure retirement were lost because the Studebaker plan had little or no money to pay benefits.[186] The purpose of a funding rule is to force employers to contribute money for benefits as they are earned. Even if the employer becomes unwilling or unable to continue the plan, there will be substantial funding for benefits earned under the plan.

Opponents believe that there is no need for a funding rule in government plans. They argue that since governments do not go out

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183. PENSION TASK FORCE, 95TH CONG., 2D SESS., REPORT ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS (Comm. Print 1978).

184. *See, e.g., Hearings and Markups on H.R. 2456 and H.R. 6536 Before the Fiscal & Gov't Affairs Comm.*, 95th Cong., 1st Sess. 6-7 (1977) (statement of former Rep. Thomas M. Rees); H.R. REP. No. 779, 93d Cong., 2d Sess. 163 (1974), *reprinted in* 1974-3 C.B. 406; *Picking Losers, supra* note 64.

185. I.R.C. §§ 401(a)(4), 411(a), 412(a) (1986); 29 U.S.C. § 1104 (Supp. II 1990).

186. Seth Earl Herbert, *Investment Regulation and Conflicts of Interest in Employer-Managed Pension Plans*, 17 B.C. INDUS. & COM. L. REV. 127 (1976).

of business, the taxing power is always available to provide funding on a pay-as-you-go basis. Although this line of reasoning is fine for governments that do not overspend, a funding requirement is the only adequate response to a Ponzi-type approach to funding.[187]

Certain transactions should be prohibited or restricted. ERISA forbids loans to the employer and limits investments in employer property to 10% of plan assets.[188] Those measures are designed to reduce the risk of loss, and there is no substantial difference between private and public plans. Governments usually do not attempt to borrow from a plan unless they are unable to borrow from anyone else. Investments in properties such as bonds and other securities should be limited to encourage diversification. An exception could be made for federal plans such as Social Security, whose investments have always been limited to federal obligations.[189]

Fiduciary conduct should be subject to several express duties. The statute should require undivided loyalty to the beneficiaries, as well as compliance with the prudent investor rule and diversification principles. The prudent investor principal should be expanded to identify the viewpoint to be used when working with cases. ERISA defines the prudent investor as a person in the business of being a fiduciary.[190] Thus, the conduct of the Secretary of the Treasury and the Board of Social Security Trustees would be judged by the actions of entities such as the Chase Manhattan Bank and the Bank of America.

Enforcement of regulations may be the biggest problem. Experience under the Disclosure Act demonstrated that beneficiaries and others with notice are unlikely to pursue remedies. One reason was that the cost of suing without any chance of a direct financial recovery is prohibitive. Another was a reluctance to upset the employer. As a solution to these enforcement problems, ERISA give administrative agencies the authority to use judicial and other remedies to enforce the plan and ERISA.[191]

ERISA permits just about everyone to sue just about anybody. For example, beneficiaries, the IRS, and the Labor Department can

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187. Cunningham v. Brown, 265 U.S. 1, 7-9 (1924); *Hearings & Markups on H.R. 2456 and H.R. 6536 Before the Fiscal & Gov't Affairs Comm.*, 95th Cong., 1st Sess. 6 (1977) (statement of former Rep. Thomas M. Rees); H.R. Rep. No. 779, 93d Cong., 2d Sess. 163 (1974), *reprinted in* 1974-3 C.B. 406.

188. 29 U.S.C. §§ 1106(a)(1)(B) (1988), 1107(a)(2) (Supp. II 1990).

189. *E.g.*, Social Security Act of 1935 § 201, 49 Stat. 713 (1935) (current version at 42 U.S.C. § 401 (1992)).

190. *See* 29 U.S.C. § 1104(a)(1) (Supp. II 1990).

191. *E.g.*, Tax Treatment of Survivor Benefit Plans of the Uninformed Services, H.R. Rep. No. 298, 93d Cong., 1st Sess. (1973), *reprinted in* 1974-3 C.B. 213.

sue the trustees and the employer, and the trustees likewise can sue the employer. Federal and state courts have concurrent jurisdiction to hear suits to enforce the plan and ERISA, but federal courts have exclusive jurisdiction over criminal prosecutions.[192]

Identifying the agency responsible for enforcement is another issue. There is no apparent reason for creating a new agency, since two existing bodies work with the types of issues which PERISA covers. Granting substantial duties to two agencies has not worked well under ERISA, so that approach should not be adopted under PERISA.[193] The probability of political influence is a major concern in deciding how to regulate governmental plans. Labor has not demonstrated substantial interest in ERISA enforcement. On the other hand, IRS is less susceptible to political pressure, and has expended much effort on ERISA enforcement in areas such as funding.

Whenever there is doubt about whether officers will faithfully perform their duties, oversight is one response. Beneficiaries and representative groups including unions should be encouraged to report any irregularities to the enforcement agency. If these complaints do not produce satisfactory results, then those persons should be able to sue the enforcement agency.[194] A successful plaintiff should have the right to recover attorney fees and other litigation costs, and the court should have discretion to award punitive damages against the enforcement agency.

V. Conclusion

Politicians who are desperate for money will take it from anyone, including widows and orphans. Beneficiaries have a contractually based property interest in government pension plans and are entitled to sue if the terms of the plan are not observed. For example, retired and employed beneficiaries of the West Virginia pension plan could sue the state for refusing to comply with its duty to contribute to the plan and could sue the trustees for permitting unauthorized withdrawals.[195]

Misuse of assets is the Watergate of government pension plans. The attitude of many officials is illustrated by the remarks of one investment advisor. When asked why he did not do more to stop risky

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192. 29 U.S.C. § 1132(a) (Supp. II 1990).

193. *E.g.*, 29 U.S.C. § 1204 (1992); Beverly M. Klimkowski & Ian D. Lanoff, *ERISA Enforcement: Mandate for a Single Agency*, 19 U. Mich. J.L. Ref. 89 (1985).

194. *See* I.R.C. § 7430(a) (1986).

195. *E.g.*, Aikens v. Alexander, 397 N.E.2d 319 (Ind. Ct. App. 1979); Board of Trustees v. City of Baltimore, 562 A.2d 720 (Md. 1989); Dadisman v. Moore, 384 S.E.2d 816 (W. Va. 1988).

investments by the Kansas pension plan, he said, "[W]hen the locomotive is coming down the track, you don't throw yourself in front of the train."[196] But, in fact, it was his fiduciary duty as a trustee to throw himself on the rails in front of the oncoming locomotive. The only question is why an experienced and apparently responsible official failed to comply with the duties of his office.

Regardless of the words used, government pension plans are trusts under state law. Those who have discretion to manage trust affairs are trustees. The duty to manage plan assets can be divided into three categories: (1) timely collection of employer and employee contributions in full from the government, (2) proper investment of plan assets, and (3) limiting distributions to those approved by the plan.[197]

There remains a need for additional regulation of pension funds. Although most of the topics that might be covered by PERISA are beyond the scope of this Article, the need for explicit fiduciary standards and active administrative oversight and enforcement was highlighted by recent events.[198] Federal statutes should make clear that government pension arrangements are always trusts and that those in charge of their management are always trustees.

All government plans should be covered by PERISA. So long as the plan is primarily for government employees, it should not matter whether it is run by the government, an agency, or instrumentality, such as a school board or a labor union. Plans primarily for other persons such as Social Security should also be covered.

The fiduciary standards under PERISA generally ought to be the same as those of ERISA. The statute should expressly: (1) impose a duty of timely collection of contributions in full, (2) mandate a strict and comprehensive prudent investor rule, (3) call for an adequate return on investments, (4) include a list of prohibited transactions, (5) limit disbursements to purposes identified by the plan, and (6) require undivided loyalty to the beneficiaries.[199]

The prudent investor rule should cover several subtopics. Since a prudent investor would be concerned about whether he is likely to get his money back, he would carefully make reasonably safe investments and would diversify his portfolio to eliminate undue risks in order to reduce the possibility of large losses. Loans to employers would be

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196. *Picking Losers, supra* note 64; *see generally* Mertens v. Hewitt Assocs., 948 F.2d 607 (9th Cir. 1991), *on remand sub nom*, Mertens v. Kaiser Steel Retirement Plan, 1992 U.S. Dist. LEXIS, 10770 (N.D. Cal. 1992), *cert. granted*, 1992 U.S. LEXIS 5544.

197. *E.g.*, Dadisman v. Moore, 384 S.E.2d 816 (W. Va. 1988).

198. *Id.* at 821-22.

199. 29 U.S.C. §§ 1104(a) (Supp. II 1990), 1106(a) (1988).

prohibited, since they tend to be unnecessarily risky. Holdings of employer property should be limited to 10% of plan assets for the same reason.[200]

Jurisdiction should be similar to ERISA. Federal and state courts should have concurrent jurisdiction to hear lawsuits brought by interested persons such as beneficiaries, governments and trustees. Courts should be authorized to grant legal and equitable relief against beneficiaries, governments and trustees. There should be concurrent jurisdiction to hear criminal prosecutions against trustees for intentional impropriety.[201]

Enforcement may be the major problem. The Disclosure Act did not work because beneficiaries and representative groups, such as unions, were frequently unwilling to pursue claims.[202] There is a need for an aggressive body that is responsible for enforcement. Because creating a new agency seems unnecessary, the problem lies in identifying the existing agency best able to manage pension fund issues. Labor is not a good choice because it is relatively political and has not demonstrated substantial interest in dealing with ERISA problems. IRS is much less political and has exerted considerable effort in ERISA matters, so it may be the best choice.

Congress does not like the idea of reasonable regulation of government plans. Congress demanded annual reports when Social Security was on the brink of bankruptcy, deciding it was prudent to oversee the financial operations of other plans. Although the statute used most of the ERISA definition of annual reports, it rejected the clause which would have required that the reports be made available to beneficiaries.[203] Thus, beneficiaries do not have a legal right to the annual reports and can get them only through the cooperation of members of Congress. There has been no proposal to regulate other aspects of federal plans.

Congress has the same general attitude towards regulating state and local plans. In 1978, the results of an ambitious, extensive Congressional study of those plans were published. Although the study indicated the need for regulation and although bills were introduced

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200. 29 U.S.C. §§ 1104(a)(1)(C) (Supp. II 1990), 1107(a)(2) (Supp. II 1990).

201. 29 U.S.C. §§ 1131, 1132 (Supp. II 1990).

202. H.R. Rep. No. 533, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1974-3 C.B. 213; Scott Earl Herbert, *Investment Regulation and Conflict of Interest in Employer-Managed Pension Plans*, 17 B.C. Indus. & Com. L. Rev. 127 (1976); Robert Tilove, Public Employee Pension Funds 217 (vol. 1 1976).

203. 31 U.S.C. §§ 9501-04 (1992); H.R. Rep. No. 1678, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 5772.

in every year from 1978 through 1984,[204] not one bill passed either House of Congress. Proponents admitted defeat and abandoned the cause. No bill has been introduced since 1984.

Reasonable programs will not be enacted unless proponents and representative groups actively pursue the matter. State and local legislators who naturally oppose directives will certainly lobby hard to defeat any PERISA proposal. Regulation of federal plans is even more unlikely, since Congress does not want to pay the cost of compliance. This strong opposition to PERISA must be countered by public outcry insisting on universal employee retirement regulation. It is only when the public voice is heard that participants will gain the protection that private employees currently enjoy under ERISA.

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204. PENSION TASK FORCE, 95TH CONG., 2D SESS., REPORT ON PUB. EMPLOYEE RETIREMENT SYSTEMS (Comm. Print 1978); *see, e.g.*, *Pub. Retirement Income Security Act of 1978; House Comm. on Ed. & Labor*, 95th Cong., 2d Sess. (1978); H.R. REP. No. 1138, 98th Cong., 2d Sess. (1984).

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NOTES

Limiting the Discretion of the Administrator of Poor Relief in Indiana

Michael Ray Smith*

"Where discretion is absolute, man has always suffered."[1]

Introduction

General welfare assistance in Indiana is administered through 1008 elected township trustees[2] who decide, within their townships, to whom relief is granted, the manner in which relief is granted, and the extent to which the relief is granted. The result is a patchwork system of small geographical areas, with basic welfare decisions in each area subject to the discretion of a single trustee. A developing line of cases in federal and state courts restricts the exercise of trustees' discretion by applying the Due Process and Equal Protection Clauses of the United States

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1. United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).

2. Ind. Code § 12-20-5-1 (Supp. 1992).

(a) The township trustee of each township is ex officio the administrator of poor relief within the township.

(b) The township trustee shall perform all duties with reference to the poor of the township as prescribed by law.

(c) A township trustee, in discharging the duties prescribed by this article, is designated as the administrator of poor relief.

The Indiana poor relief statute, formerly Article 2 of Title 12 of the Indiana Code, was replaced in its entirety in 1992 by Article 20. Most of the sections of Article 20 cited in this Note had substantially identical counterparts in Article 2, and except as otherwise noted, all of the sections of Article 2 that were judicially interpreted in cases cited in this Note have substantially identical counterparts in Article 20.

Constitution[3] and the Equal Privileges Clause of the Indiana Constitution.[4]

I. The Role of Township Trustees in Poor Relief

A. Statutory Duties of the Administrator of Poor Relief

The Indiana poor relief statute imposes on the state's township trustees the responsibility to "perform all duties with reference to the poor of the township as prescribed by law."[5] The duties are both procedural and substantive.

The procedural duties prescribed by the statute are relatively specific.[6] For example, the township trustee must receive applications for poor relief,[7] investigate the claims,[8] take action on an application within seventy-two hours,[9] give notice to reapply to persons who have received poor relief for 170 days,[10] and give ten days written notice to recipients before termination of benefits.[11]

The statute also mandates the types of relief which trustees are to provide.

> A township trustee, as administrator of poor relief, may provide and shall extend poor relief only when the personal effort of the poor relief applicant fails to provide any of the following items:
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> (1) Food, including prepared food.
> (2) Clothing.
> (3) Shelter.
> (4) Light.
> (5) Water.

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3. U.S. Const. amend. XIV, § 1.
4. Ind. Const. art. I, § 23.
5. Ind. Code § 12-20-5-1 (Supp. 1992).
6. Several of the provisions were added only after courts held the statute to be unconstitutional for lack of procedural safeguards of the rights of applicants and recipients. For example, the duty to provide notice of termination of benefits, (*infra* note 11 and accompanying text), was added after the poor relief statute was declared unconstitutional for want of such a provision. Brooks v. Center Township, 485 F.2d 383, 385-86 (7th Cir. 1973), *cert. denied*, Indiana v. United States Court of Appeals for the Seventh Circuit, 415 U.S. 911 (1974).
7. Ind. Code § 12-20-6-1 (Supp. 1992).
8. *Id.* § 12-20-6-9 (Supp. 1992).
9. *Id.* § 12-20-6-8 (Supp. 1992). The statute excludes weekends and legal holidays from the 72-hour period.
10. *Id.* § 12-20-6-2 (Supp. 1992).
11. *Id.* § 12-20-14-1 (Supp. 1992).

(6) Fuel for heating and cooking.

(7) Household supplies, including first aid and medical supplies for minor injury or illness.

(8) Household necessities that include basic and essential items of furniture and utensils.

(9) Heating and cooking stoves.

(10) Transportation to seek and accept employment.[12]

Furthermore, the law authorizes the trustee to furnish temporary aid to relieve "immediate suffering."[13] There are specific provisions for medical treatment,[14] utility bills,[15] school lunches,[16] emergency shelter,[17] food,[18] livestock feed,[19] transportation,[20] funeral expenses,[21] and insulin.[22] The statute even authorizes trustees to maintain gardens for poor relief.[23]

Although the statute prescribes what relief the trustees must provide, it does not dictate the extent to which it must be provided. Trustees must maintain written standards of eligibility and benefits,[24] but no law fixes the content of the standards.[25]

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12. *Id.* § 12-20-16-1 (Supp. 1992).
13. *Id.* § 12-20-17-1 (Supp. 1992).
14. *Id.* § 12-20-16-2 (Supp. 1992).
15. *Id.* § 12-20-16-3 (Supp. 1992).
16. *Id.* § 12-20-16-4 (Supp. 1992).
17. *Id.* § 12-20-17-2 (Supp. 1992).
18. *Id.* § 12-20-16-5 to -9 (Supp. 1992).
19. *Id.* § 12-20-16-10 (Supp. 1992).
20. *Id.* § 12-20-16-11 (Supp. 1992).
21. *Id.* § 12-20-16-12 (Supp. 1992).
22. *Id.* § 12-20-16-14 (Supp. 1992).
23. *Id.* § 12-20-16-13(c) (Supp. 1992).
24. The statute itself does not require standards. In Hopson v. Schilling, 418 F. Supp. 1223 (N.D. Ind. 1976), an applicant challenged the constitutionality of the trustees' practice of administering poor relief without written eligibility and benefit standards. An unpublished consent decree obligated the trustees to maintain written standards. Hopson v. Schilling, No. L-75-30 (N.D. Ind. May 18, 1978). *See* Cynthia J. Reichard, Note, *Due Process in the Administration of General Assistance: Are Written Standards Protecting the Indigent?*, 59 IND. L.J. 443, 449-50 (1984); IND. LEGISLATIVE SERVS. AGENCY, FAMILIES IN POVERTY AND LOCAL SERVICE DELIVERY, at 84 (1991) [hereinafter FAMILIES IN POVERTY].
25. *See* FAMILIES IN POVERTY, *supra* note 24, at 84. Although there are no statutory guidelines for granting relief, there are specific provisions for *denying* relief. For example, "[t]he township trustee may deny poor relief assistance to an individual if the township trustee determines that the individual does not intend to make the township or county the individual's sole place of residence." IND. CODE § 12-20-8-3 (Supp. 1992). This requirement of intent to make the township the sole place of residence replaces a former requirement of a three-year residency within the state, *Id.* § 12-2-1-5 (1988). The latter was held to be unconstitutional for discriminating against those who had recently exercised their right to travel between states. Eddleman v. Center Township of Marion County, 723 F. Supp. 85, 89-90 (S.D. Ind. 1989). Also, the trustee may deny relief to persons who receive benefits under Assistance For Dependent Children. IND. CODE § 12-20-6-6 (Supp. 1992); Wayne Township v. Hunnicutt, 549 N.E.2d 1051, 1053 (Ind. Ct. App. 1990).

B. The Scope of Trustee Discretion

The absence of uniform eligibility and benefit standards creates expansive discretion in the office of the trustee. The following subsections exemplify the practical operation of trustee discretion. Specific examples are taken from a typical set of poor relief standards.[26]

1. Discretion to Determine Who is Eligible for Relief.—The law furnishes only the ambiguous mandate that trustees provide relief "only when the personal effort of the poor relief applicant fails to provide any of" a list of items essential for subsistence.[27] Because there are no state standards for deciding whether an applicant's own efforts have failed to satisfy the applicant's needs, it falls within the discretion of the individual trustee to determine who has need and who does not.[28]

Income guidelines are one of the most consequential rules for determining need. If a family's monthly income exceeds a specified amount established by the trustee, the family is not eligible for relief of any type.[29] Furthermore, the trustee decides what income to consider and determines the method of calculating monthly income.[30]

Income is not always the only factor in a trustee's determination of eligibility. The trustee may decide to grant relief to applicants with extraordinary expenses even if their incomes exceed the usual guidelines.[31] The trustee may choose to deny relief to an applicant if the trustee finds that the applicant "wastes income"[32] or engages in activities such as providing false information, failing to actively seek employment, or appearing intoxicated in the trustee's office.[33]

2. Discretion to Determine Nature and Extent of Relief.—Over a century ago, the Supreme Court of Indiana held, "[t]he nature and extent of such relief, in each particular case, is largely entrusted to the sound discretion and practical judgment of the township trustee, as overseer of the poor."[34] The holding still stands.[35]

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26. Ed Buckley, Poor Relief Standards for the Perry Township Trustee of Marion County (1992).

27. Ind. Code § 12-20-16-1 (Supp. 1992).

28. *Hunnicutt*, 549 N.E.2d at 1503 ("The determination of need is placed within the Trustee's discretion."); Families in Poverty, *supra* note 24, at 84.

29. Buckley, *supra* note 26, at 11.

30. Buckley, *supra* note 26, at 11. (Trustee considers monetary and nonmonetary income received within the previous 30 days).

31. Buckley, *supra* note 26, at 13.

32. Buckley, *supra* note 26, at 10.

33. Buckley, *supra* note 26, at 13-14.

34. Board of Comm'rs v. Harlem, 8 N.E. 913, 916 (Ind. 1886).

35. State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234, 241 (Ind. Ct. App. 1981) ("[T]he legislature extended to the Trustee discretion in the administration of poor relief assistance as regards the nature and extent of the relief to be afforded given the particular circumstances of the individual applicant.").

Consider for example an applicant who, in danger of losing his or her home to foreclosure, appears at a trustee's office and asks for assistance in making a mortgage payment. Although the trustee must provide shelter[36] and may not categorically refuse to make loan payments for people purchasing a home,[37] the trustee establishes the criteria for deciding who will receive aid for loan payments and who will be forced to obtain alternative shelter.[38] If the trustee refuses to make mortgage payments, thereby forcing the applicant to find rental shelter, the applicant may find that the trustee refuses to provide a security deposit required by landlords.[39] Furthermore, the trustee may refuse to provide rent if the applicant chooses a landlord who is not on a list of those approved by the trustee.[40] Finally, the amount of rent to be paid is determined at the trustee's discretion.[41]

3. Authority to Create Procedures.—As well as establishing poor relief eligibility and benefit standards, trustees also mandate procedures that an applicant must follow in order to be eligible.[42] For example, the trustee may require an applicant to account for every individual household expenditure with written receipts or notarized affidavits.[43] He or she may direct an applicant to seek less expensive housing.[44] If the applicant fails to comply with these procedural requirements, the trustee may automatically deny relief.[45]

4. Protection Against Abuse of Discretion.—Trustees are independent, elected officials; they are not subject to any direct supervision.[46]

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36. IND. CODE § 12-20-16-1 (Supp. 1992).

37. *Van Buskirk*, 418 N.E.2d at 242.

38. BUCKLEY, *supra* note 26, at 22-23 (listing 16 factors Trustee considers in deciding whether to make a loan payment).

39. BUCKLEY, *supra* note 26, at 22. *But see* Center Township v. Coe, 572 N.E.2d 1350, 1362 (Ind. Ct. App. 1991) (affirming on other grounds mandatory injunction requiring a trustee to pay rental deposits for persons eligible for shelter assistance).

40. BUCKLEY, *supra* note 26, at 21.

41. BUCKLEY, *supra* note 26, at 21.

42. *See* South Bend Community Sch. Corp. v. Portage Township, 520 N.E.2d 446, 453 (Ind. Ct. App. 1988) (holding that pertinent statute gave trustee right to create eligibility standards and procedures which applicants must follow in order to receive aid for school books). *But see* Schrader v. Mississinewa Community Sch. Corp., 521 N.E.2d 949, 953 (Ind. Ct. App. 1988) (Garrard, J., concurring) (distinguishing *South Bend Community School* from the instant case, in which there was no reasonable relationship between the Trustee's procedural requirement and his duty to determine eligibility for assistance for school books).

43. BUCKLEY, *supra* note 26, at 12-13.

44. BUCKLEY, *supra* note 26, at 22.

45. BUCKLEY, *supra* note 26, at 13-14, 22.

46. FAMILIES IN POVERTY, *supra* note 24, at 84; Louis Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance System*, 6 IND.

Nonetheless, disappointed applicants can appeal a trustee's denial or termination of relief to the board of county commissioners.[47] When reviewing the decision, the Board follows the standards established by the trustee.[48] The commissioners decide only the merits of an individual case; they do not judge the adequacy or the fairness of the standards governing the adjudication.

The decision of the Board of County Commissioners can be appealed to the county circuit court, which hears the case as an original cause.[49] These courts review the merits of an individual case, as well as the substance of written standards. The courts will invalidate the standards if they are arbitrary or capricious.[50]

C. Allegations of Arbitrariness and Inequality

In principle, nothing is wrong with a statute that vests such discretion in the township trustee. For a general assistance program to work effectively, it must be run by someone who has the authority to make and interpret standards and guidelines. In Indiana, the legislature has placed the authority in the offices of the township trustees. In practice, critics allege, the granting of such expansive discretion to so many individuals, each the "supreme administrator"[51] of poor relief within a tiny geographical area, fosters "inconsistency and arbitrariness"[52] and "striking . . . inequalities."[53]

An analysis of Indiana poor relief published twenty years ago identified two types of inequalities among poor relief applicants or recipients.[54] The first occurs when a single trustee discriminates between classes of

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L. Rev. 385, 391 (1973). Each township has an advisory board, and the state board of accounts is responsible for assuring there is no misappropriation of money. However, these boards do not review the decisions of the trustee in establishing guidelines or in applying them to individual applications for relief.

47. Ind. Code § 12-20-15-1 (Supp. 1992). *See generally* Richard A. Dean, Note, *General Assistance Programs: Review and Remedy of Administrative Actions in Indiana*, 47 Ind. L.J. 393 (1972).

48. Ind. Code § 12-20-15-4 (Supp. 1992); Pastrick v. Geneva Township, 474 N.E.2d 1018, 1021 (Ind. Ct. App. 1985).

49. Pastrick v. Geneva Township, 474 N.E.2d 1018, 1021 (Ind. Ct. App. 1985); State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234, 239-40 (Ind. Ct. App. 1981).

50. *See Van Buskirk*, 418 N.E.2d at 244-45.

51. Rosenberg, *supra* note 46, at 391.

52. Families in Poverty, *supra* note 24, at 84.

53. Rosenberg, *supra* note 46, at 404.

54. Rosenberg, *supra* note 46, at 410-11. Rosenberg also discusses discrimination among taxpayers in different townships. *Id.* at 411. Discrimination among taxpayers is not considered in this Note.

people within a single township.[55] Critics and plaintiffs have alleged discrimination among all manner of classifications of applicants or recipients. For example, the plaintiffs in a case discussed below claimed that a trustee's method of providing emergency shelter by placing homeless applicants in private missions discriminated against those whom the missions would not accept: women, families, and individuals who were in need of detoxification or medical treatment for substance abuse problems.[56] In an earlier case the plaintiffs claimed that a trustee's policy of paying rent but not loan payments discriminated between applicants for poor relief who rented their homes and those who purchased them.[57]

The structuring of poor relief administration as a geographical patchwork creates the second type of inequality, the unequal treatment of similarly situated applicants or recipients from township to township.[58] For example, advocates of poor relief reform allege that eligibility standards vary dramatically among the townships.[59] The following table illustrates the variation in monthly income eligibility guidelines for a single person.

County	*Township*	*Monthly Income*[60]
Crawford	Johnson	$ 78.75
Marion	Wayne	166.00
Lagrange	Bloomfield	210.00
Porter	Washington	210.00
Johnson	Franklin	232.00
Huntington	Huntington	250.00
Tippecanoe	Fairfield	260.00
Posey	Black	277.00
Montgomery	Wayne	310.00
Clinton	Union	350.00
Allen	Wayne	437.00
Franklin	Ray	625.00

Of course there are many possible explanations for such differences. Among them are variations in the amount of public funds available for

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55. Rosenberg, *supra* note 46, at 410-11.

56. Center Township v. Coe, 572 N.E.2d 1350 (Ind. Ct. App. 1991).

57. State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234 (Ind. Ct. App. 1981).

58. Rosenberg, *supra* note 46, at 411.

59. Joseph A. Micon, Jr., et al., Indiana Poor Relief: The Myths and Facts About Township Assistance 9-10 (1987) (Indiana Task Force on Poor Relief, Lafayette Urban Ministry) (1987).

60. *Id.* at 9. The original source lists income guidelines from 31 counties. A sample covering the range of township size and amount of income guidelines is included here.

poor relief, local differences in the cost of providing basic subsistence, and the availability of other sources of aid. Some of the possible explanations mitigate the inequality of the differing eligibility guidelines; others do not.

Eligibility guidelines are not the only indicators of inequality among townships. For example, trustees differ in the amount of benefits they provide.[61] Some townships have guidelines that are more generous than others. However, generous guidelines do not necessarily mean that more assistance is actually delivered. Although rural townships are more generous with income guidelines than are urban townships, the percentage of poor people who actually receive aid is smaller in rural townships.[62]

Policies and decisions which are arbitrary, even if not discriminatory, can injure poor people. Observers have noted that eligibility standards are frequently far below the poverty level and that benefits are inadequate. Therefore, guidelines are apparently created without reference to the actual cost of providing basic subsistence.[63]

Factors other than those explicitly stated in written standards can also cause capricious decisions. The observation that poor people in rural townships are less likely to receive relief than those in urban townships suggests that unidentified factors influence eligibility decisions.[64]

D. Restrictions on Trustee Discretion

The unfairness and inequality described above are not inherent in the poor relief statute itself; rather they flow from the arbitrary and unequal application of the statute as it operates through the discretion of individual trustees.

Over the last two decades, courts have recognized federal and state constitutional protections against arbitrary decisions and unequal treatment within the Indiana poor relief system. This Note examines some of those cases, beginning with the earliest decisions which established procedural requirements and extending to the most recent case that explicitly placed substantive constitutional restrictions on the exercise of trustee discretion.

II. Due Process Limitations to Trustee Discretion

A. Procedural Due Process

The first judicially imposed restrictions on the otherwise expansive discretion of trustees were grounded in procedural due process. The

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61. *Id.*
62. *Id.* at 10.
63. Families in Poverty, *supra* note 24, at 83.
64. Micon, Jr., *supra* note 59, at 10.

threshold question for a due process claim is whether the plaintiff has suffered deprivation of liberty or property.[65] In *Goldberg v. Kelly*,[66] the Supreme Court held that welfare benefits may constitute a property interest protected by procedural due process.[67] Although the facts of *Goldberg v. Kelly* were limited to the termination of categorical welfare benefits under a federal statute, later cases held that due process also protects general assistance benefits created under state statutes and that the right to due process may belong not only to recipients, but also to applicants for general assistance.[68] In Indiana, it is now settled law that township trustees must procedural provide due process to poor relief applicants[69] and to poor relief recipients.[70]

In Indiana and other states, the most important procedural protection against unfair effects of the administrator's discretion in general welfare assistance is the use of written, objective, ascertainable standards.[71] The requirement of written standards and their effectiveness has been previously analyzed.[72] The only comments that need to be added here are those to place the use of written standards in perspective as the starting point for more intrusive restrictions.

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65. Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

66. 397 U.S. 254 (1970).

67. *Id.* at 263.

68. Daniels v. Woodbury County, 742 F.2d 1128, 1132-33 (8th Cir. 1984); Griffeth v. Detrich, 603 F.2d 118, 120-22 (9th Cir. 1979), *cert. denied*, Peer v. Griffeth, 445 U.S. 970 (1980); Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1138 (D. N.H. 1976). *Contra* Gregory v. Pittsfield, 479 A.2d 1304 (Me. 1984), *cert. denied*, 470 U.S. 1018, 1021 (1980) (O'Connor, J., dissenting) (observing that the Maine holding that no protected property interest exists until an application for general assistance is approved is against the weight of authority in lower federal courts).

69. Reichard, *supra* note 24, at 449-50 (citing Hopson v. Schilling, No. L-75-30, slip op. at 4 (N.D. Ind. May 18, 1978)).

70. Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973), *cert. denied*, Indiana v. United States Court of Appeals for Seventh Circuit, 415 U.S. 911 (1974).

71. *See supra* note 24 and accompanying text. For cases from other states in which courts have insisted on the use of written standards in the administration of general assistance programs, see Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978) (holding ascertainable standards insure fairness and avoid arbitrary decision making); White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976) (deciding administrator of Illinois general assistance program who determined eligibility based on personal, unwritten standards had created "unfettered discretion" in himself and his staff, violating due process); Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1140 (D. N.H. 1976) ("The absence of standards creates a void in which malice, vindictiveness, intolerance or prejudice can fester."). Other procedural due process requirements not discussed in this Note include notice and the opportunity to be heard. *See, e.g.*, Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973), *cert. denied*, Indiana v. United States Court of Appeals for Seventh Circuit, 415 U.S. 911 (1974).

72. Reichard, *supra* note 24.

Courts have been uncertain, or at least unable to agree, whether the requirement of written standards is procedural or substantive due process.[73] On one hand, the court in *Baker-Chaput v. Cummett*[74] wrote that, although the substantive and procedural aspects of due process are "inextricably intertwined," the requirement of written standards "is essentially a question of substantive due process."[75] On the other hand, the Seventh Circuit decided *White v. Roughton*[76] under procedural due process.[77]

The Supreme Court recently elaborated on the distinctions between procedural and substantive due process. The plaintiff in *Washington v. Harper*,[78] a prisoner, claimed that the administration of psychotropic drugs against his will and without a judicial hearing violated his due process rights. The Washington Supreme Court analyzed the case as a procedural due process issue and held that the prisoner was entitled to a judicial hearing in which the state must present "clear, cogent, and convincing" evidence that the treatment was "both necessary and effective for furthering a compelling state interest."[79] The United States Supreme Court explained that such a holding went beyond procedure and into substance.

> The [state] court, however, did more than establish judicial procedures for making the factual determinations called for by [the Special Offender Center Policy].
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> . . . .
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> . . . [T]he substantive issue is what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will; the procedural issue is whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient.[80]

In view of *Washington v. Harper*, the better position is that the requirement that trustees put their eligibility criteria in writing is procedural, rather than substantive, due process. The content of the standards includes the factual circumstances that must exist before a trustee will grant poor relief. To reach the content of standards is to invoke substantive due process.

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73. Reichard, *supra* note 24, at 446.
74. 406 F. Supp. 1134 (D. N.H. 1976).
75. *Id.* at 1137.
76. 530 F.2d 750 (7th Cir. 1976).
77. *Id.* at 754.
78. 494 U.S. 210 (1990).
79. *Id.* at 218.
80. *Id.* at 219-20.

Pastrick v. Geneva Township[81] is an example of a case which dealt with only procedural aspects of poor relief standards. The Indiana Court of Appeals held that the county commissioners in hearing an appeal from a trustee's decision "are guided by uniform relief standards of eligibility and need established by the township trustee."[82] Even though *Pastrick* reinforced the importance of the written standards to establish the rules defining the rights of applicant poor relief applicants, it did not place any requirements or restrictions on their content.

In *State ex rel. Van Buskirk v. Wayne Township*[83] the Indiana Court of Appeals addressed the adequacy of trustee standards. The Wayne Township poor relief standards provided that "[t]he amount and length of assistance . . . shall be as determined by the Trustee."[84] Applicants who had been denied relief argued that the provision reserved unlimited discretion to the trustee in determining the nature and extent of benefits, a result that standards are intended to prevent.[85] In essence, a written standard which reserves "unfettered discretion"[86] for the administrator is no written standard at all. The court agreed with the applicants, holding that due process demands that poor relief standards must be reasonably complete and must set forth all the needs that will normally be met, including all those specifically called out in the statute.[87] Procedural due process provides the foundation for the holding because it simply elaborates on the due process requirement that trustees maintain written standards.

In *Wayne Township v. Hunnicutt*,[88] the Court of Appeals of Indiana held that the poor relief statute does not require a trustee to extend relief to recipients of Assistance to Dependent Children (ADC).[89] The poor relief applicants, who had been denied poor relief because they receive ADC benefits, argued that their right to due process was violated because the Trustee's written standards did not mention the categorical exclusion and because the Trustee had an unwritten policy of granting relief to ADC recipients.[90] The court, deciding the case on purely statutory

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81. 474 N.E.2d 1018 (Ind. Ct. App. 1985).

82. *Id.* at 1021 (applying IND. CODE § 12-2-1-18 (1982) (repealed 1992)). IND. CODE ANN. § 12-2-1-18 is superceded by IND. CODE ANN. § 12-20-15-4 (Supp. 1992).

83. 418 N.E.2d 234 (Ind. Ct. App. 1981).

84. *Id.* at 245.

85. *See* Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1139 (D.N.H. 1976), *quoted in Van Buskirk*, 418 N.E.2d at 245.

86. White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976).

87. *Van Buskirk*, 418 N.E.2d at 245 (citing Holmes v. New York City Hous. Auth., 398 F.2d 262 (2nd Cir. 1968)).

88. 549 N.E.2d 1051 (Ind. Ct. App. 1990).

89. *Id.* at 1054.

90. Brief for Appellees at 14-15, Wayne Township v. Hunnicutt, 549 N.E.2d 1051 (Ind. Ct. App. 1990) (No. 02A04-8902-CU-59).

grounds, did not reach the due process question because it was raised for the first time on appeal.[91] For present purposes, the unaddressed issues that were raised by the poor relief applicants are more important than the holding of the case. Those questions raise the point that the mere existence of written standards may fail to protect poor relief applicants and recipients. The potential inadequacy of procedural protections creates the need for judicial review of the content of the standards.

B. Review of Standards for Abuse of Discretion

Van Buskirk[92] contained a second holding which reached the content of written standards. The Van Buskirks claimed that the Trustee's income standards for eligibility were so low that some people whose own efforts had failed to provide basic subsistence would be ineligible.[93] The Court of Appeals held that poor relief standards are subject to review for abuse of discretion.

> Only if the standards can be said to be arbitrary and capricious, [sic] can a court invalidate them. The procedure followed for setting both the income eligibility and the benefit amounts would be arbitrary if made without reliance upon evidence reasonably related to the need for and cost of food, shelter, etc.[94]

Therefore, the *Van Buskirk* court described circumstances under which the simple existence of a procedure required by due process was insufficient to protect poor relief applicants from arbitrary decisions.[95] In doing so, the court expressed a willingness to judge the content of poor relief standards by looking beyond procedural protection and into substance.

The essence of substantive due process is protection from arbitrary action.[96] The results of state action must not be "arbitrary or capri-

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91. 549 N.E.2d at 1052 n.2.

92. State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234 (Ind. Ct. App. 1981).

93. *Id.* at 244.

94. *Id.*

95. Reichard, *supra* note 24, argues generally that written standards, particularly ones as malleable as those in Indiana, are insufficient to protect the rights of indigent people.

96. *See, e.g.*, Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956). There are two tests for violation of substantive due process: compelling state interest when a fundamental right is involved, Roe v. Wade, 410 U.S. 113, 155 (1973), and rational basis in other cases, Bowers v. Hardwick, 478 U.S. 186, 195 (1986). Because there is no fundamental right to welfare benefits, Lavine v. Milne, 424 U.S. 577, 585 n.9 (1976) (citing Dandridge v. Williams, 397 U.S. 471 (1970)), most claims that a trustee's action violates substantive due process would be judged under low scrutiny.

cious,"[97] and statutes must not be "discriminatory, arbitrary, or oppressive."[98] In *Van Buskirk*, the Court of Appeals of Indiana held that a trustee's eligibility and benefit standards which are not based on evidence of the actual cost of basic subsistence would be "arbitrary and capricious."[99]

The principles of due process prohibit the state from creating arbitrarily defined benefits, whether the definition of those benefits is established by statute or entrusted to the discretion of township trustees. The express legislative purpose which underpins the Indiana poor relief statute "is to provide necessary and prompt relief to the citizens and residents of Indiana,"[100] a purpose that is to be "accomplished as equitably and expeditiously as possible."[101] This purpose cannot be equitably accomplished if the right to poor relief is allowed to expand and contract at the whim of a local official who is not accountable to anyone. If a trustee establishes eligibility guidelines with no demonstrated relationship to the ability of a person to provide his or her own subsistence or if the trustee employs benefit guidelines with no demonstrated correlation to the cost of meeting basic needs, such guidelines do not bear a reasonable relation to the purpose of the statute. Under this analysis, the holding of *Van Buskirk* not only comports with due process but is compelled by due process.

III. Center Township v. Coe: Alleviating Inequality Within a Township

Center Township v. Coe[102] is the first published decision to impose explicit, substantive constitutional restrictions on the exercise of a trustee's discretion. The Court of Appeals of Indiana held that a trustee violated the Equal Protection Clause of the federal constitution and the Equal Privileges Clause of the Indiana Constitution by providing unequal benefits to different classes of people within the same township. *Coe* therefore addresses the first type of inequality described by Rosenberg.[103]

The homeless plaintiffs in *Center Township v. Coe* challenged the Trustee's policy of providing emergency shelter by housing poor relief recipients in private missions. Because some missions accepted only single men and because some rejected anyone who had been drinking, the

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97. City of Eastlake v. Forest City Enter., Inc., 426 U.S. 668, 676 (1976).

98. Johns v. May, 402 So. 2d 1166, 1169 (Fla. 1981).

99. State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234, 244 (Ind. Ct. App. 1981).

100. Ind. Code § 12-20-1-2 (Supp. 1992).

101. *Id.* § 12-20-1-2 (Supp. 1992).

102. 572 N.E.2d 1350 (Ind. Ct. App. 1991).

103. *See supra* notes 54-57 and accompanying text.

township suffered an inadequate supply of emergency housing for women, for families, and for indigents who had consumed alcohol or who required detoxification or medical treatment for substance abuse problems. The trial court held that the Trustee's policy denied those classes of people equal protection[104] in the provision of emergency shelter.[105]

The homeless appellees argued that, inasmuch as the Trustee's means of providing emergency shelter disrupted family living arrangements, the court should apply strict scrutiny.[106] The appellees further argued that, inasmuch as the Trustee's practices discriminated by gender, his actions were subject to middle level scrutiny.[107] Finally, the appellees argued that the Trustee's policy violated equal protection under any standard of review:

> [R]egardless of whether this Court applies a strict, middle, or low level of scrutiny to review the Trustee's actions, they do not comport with the fundamental principle of the equal protection clauses of the Indiana and the United States Constitutions, which require the government to treat similarly situated people equally. The Trustee's discriminatory program does not serve a

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104. Equal protection requires that people who are similarly situated be treated alike. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). The highest standard of review is strict scrutiny, under which the state must demonstrate a compelling interest to justify the classification. *Id.* at 440. Strict scrutiny applies only when a fundamental right is threatened or when the law discriminates against a suspect class of people. *Id.*; Eddleman v. Center Township, 723 F. Supp. 85, 87 (S.D. Ind. 1989). Under the lowest standard of review, the statute must be "rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 439. For gender classifications, *id.* at 440-41; Craig v. Boren, 429 U.S. 190, 197 (1976), and for illegitimacy classifications, *Cleburne*, 473 U.S. at 441, the Court has required that the classification have a substantial relationship to an important government interest. There is no fundamental right to welfare benefits. Dandridge v. Williams, 397 U.S. 471, 485 (1970); Eddleman v. Center Township, 723 F. Supp. at 91 n.12. If the challenged statute does not discriminate against a suspect class, courts review welfare cases under a rationality standard. Califano v. Aznavorian, 439 U.S. 170, 174 (1978).

105. *Coe*, 572 N.E.2d at 1353. The trial court had held that the Trustee violated two other constitutional provisions not discussed here. Because the missions frequently required residents at the emergency shelters to attend religious services, the trial court held that the Trustee had violated the First Amendment. *Id.* The court of appeals affirmed. *Id.* at 1358. The trial court also held that the Trustee's failure to discharge his statutory duty violated due process. *Id.* at 1352. The court of appeals did not reach the due process claim.

106. Brief for Appellees at 45, Center Township v. Coe, 572 N.E.2d 1350 (Ind. Ct. App. 1991) (No. 49A028909CV455) (citing Moore v. City of East Cleveland, 431 U.S. 494 (1977); *see* Halet v. Wend Inv. Co., 672 F.2d 1305, 1310-11 (9th Cir. 1982)).

107. Appellees' Brief at 45-46, *Coe* (No. 49A028909CV455) (citing Craig v. Boren, 429 U.S. 190 (1976)).

> compelling or important state interest, and is not even rationally related to any legitimate goal. [Citations omitted.][108]

The court, disregarding the first two arguments, implicitly accepted the third by following the New York Superior Court, which had reviewed a similar case under the rational basis standard.

> The City of New York cannot enter into an agreement . . . that purports to set standards for shelters for the homeless, that is applicable only to shelters housing men, unless a rational basis exists for excluding women from its terms. No such basis has been urged or suggested by defendants and, indeed, none exists.[109]

The Indiana court declared, "[w]e agree with the courts of New York that unequal treatment of homeless women and families denies those women and families the equal protection guarantees of the State and Federal Constitutions."[110]

Although the nature and extent of relief are within the discretion of a trustee, the Trustee of Center Township exercised that discretion in a manner that arbitrarily discriminated between classes of people within his charge. *Center Township v. Coe* establishes that such action does not withstand even the lowest level of scrutiny.

Center Township v. Coe is consistent with the holding of the United States Supreme Court in *Allegheny Pittsburgh Coal Co. v. County Commission*.[111] In *Allegheny Pittsburgh* a local tax assessor adopted a practice of assessing real property value based on the purchase price with only minor adjustments to the assessed value of property which had not been recently sold. The result was dramatic disparity among the assessed values of comparable properties. The Court rejected the county's argument that the practice adopted by the assessor was rationally related to the purpose of assessing property at its true value. The assesor had used recent market value and, as the market information became outdated, adjusted the assessed value based on some measure of change in market values in the area.[112] The Court held that such a practice violated equal protection.[113]

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108. *Id.* at 46 (citing Eldredge v. Koch, 459 N.Y.S.2d 960 (N.Y. Sup. Ct. 1983), *rev'd on other grounds*, 469 N.Y.S.2d 744 (N.Y. App. Div. 1983); Reilly v. Robertson, 360 N.E.2d 171 (Ind. 1977), *cert. denied*, 434 U.S. 825 (1977); Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

109. *Coe*, 572 N.E.2d at 1361 (quoting Eldredge v. Koch, 459 N.Y.S.2d 960, 961 (N.Y. Sup. Ct. 1983)).

110. *Id.* at 1362.

111. 488 U.S. 336 (1989).

112. *Id.* at 343.

113. *Id.*

Allegheny Pittsburgh is similar to *Center Township v. Coe* in holding the practice of a local official unconstitutional under rational basis analysis. In both cases, the practice was theoretically non-discriminatory,[114] but the practical results were that people who were similarly situated were treated disparately. In both cases there was an unambiguous declaration of state purpose or policy: the West Virginia Constitution provided for uniform property taxes throughout the state,[115] and the Indiana statute provided that the purpose of poor relief law was "to provide necessary and prompt relief to the citizens and residents of Indiana."[116] In both cases, local officials on their own initiative implemented policies which were not rationally related to that purpose.[117]

In addition to ruling under the Fourteenth Amendment, the trial court in *Center Township v. Coe* held that the trustee's action violated the plaintiffs' rights to equal protection under Article 1, Section 23, of the Indiana Constitution.[118] The court of appeals discussed equal protection as if constitutionality under the federal and state constitutions were the same issue—a comparison which is taken up in Section IV of this Note. Here, it is sufficient to observe that *Center Township v. Coe* establishes that the state constitution affords protection against discriminatory treatment by a trustee within a single township.

IV. Alleviating Inequality Among the Townships

Center Township v. Coe does not directly reach the second type of inequality described by Rosenberg: the disparate administration of poor

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114. "We do not intend to cast doubt upon the theoretical basis of such a scheme." *Id.*

115. *Id.* at 338; W. Va. Const. art. X, § 1. The state constitution provided the starting point for the Supreme Court's analysis despite the holding of the Supreme Court of Appeals of West Virginia that the tax assessor's practice did not violate the state constitution. *In re* Tax Assessments Against Oneida Coal Co., 360 S.E.2d 560, 564 (W. Va. 1987).

116. Ind. Code § 12-20-1-1 (Supp. 1992).

117. 488 U.S. at 345. The Supreme Court recently confirmed that the fatal aspect of the tax assessor's practice in *Allegheny Pittsburgh* was the lack of any relationship between that practice and the state's policy. Nordlinger v. Hahn, 112 S. Ct. 2326, 2335 (1992). In upholding California's acquisition-value tax structure, *id.* at 2331-36, the Court distinguished *Allegheny Pittsburgh*, *id.* at 2333-35. "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme. By contrast, Article XIIIA was enacted precisely to achieve the benefits of an acquisition-value system." *Id.* at 2335.

118. 572 N.E.2d 1350, 1360-62 (Ind. Ct. App. 1991). Ind. Const. art. 1, § 23, is sometimes called an equal protection clause because it serves essentially the same purpose as the Equal Protection Clause of the Fourteenth Amendment. *See infra* section IV.B. This Note refers to Art. 1, § 23, as the Equal Privileges Clause to avoid confusion and because it more accurately represents the text of the constitution.

relief among the townships.[119] Attempts to apply equal protection and equal privileges to address inequality across township lines face certain problems which are beyond the scope of this Note. For example, there is judicial reluctance to impose uniformity across political boundaries. This reluctance manifests itself in the hesitancy of courts to grant relief for racially segregated schools when desegregation plans cross school districts.[120] The matter is further complicated by the fact that intertownship inequality is not caused by the action of a single trustee, or even by some or all of the trustees working in concert, but rather intertownship inequality is created when all 1008 trustees independently exercise their discretion. Does equal protection provide a mechanism for requiring all the trustees to treat their clients equally? This Note puts aside those practical problems to consider whether, even in principle, equal protection and equal privileges provide a guarantee of equality in poor relief across township lines.

A. Equal Protection Among Townships

Rosenberg was the first commentator to consider the application of the Equal Protection Clause to eliminate intertownship inequality in Indiana poor relief. His search for a theoretical foundation centered on a means of invoking strict scrutiny.[121] The best hope lay in the argument that townships differ in their wealth and that wealth would be considered a suspect classification.[122]

The Supreme Court soon thereafter dashed that hope in *San Antonio Independent School District v. Rodriquez*,[123] in which the Court refused to invoke strict scrutiny in reviewing the funding of schools with a disparity of wealth among school districts.[124] Wealth is not a suspect classification.[125] Equal protection attacks on inequality between townships will almost certainly be based on a simple geographical classification, a classification which also is not suspect.[126] Intertownship inequality flowing from the exercise of trustee discretion will be subject to low judicial scrutiny.

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119. *See supra* notes 58-60 and accompanying text.

120. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974). *But see* Hills v. Gautreaux, 425 U.S. 284, 298 (1976) (clarifying that "[n]othing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority" to impose a remedy that crosses municipal boundaries).

121. Rosenberg, *supra* note 46, at 405-06.

122. Rosenberg, *supra* note 46, at 405-06.

123. 411 U.S. 1 (1973).

124. *Id.* at 17-18.

125. *E.g.*, Harris v. McRae, 448 U.S. 297, 377 (1980).

126. Price v. Block, 535 F. Supp. 1239, 1247 (E.D.N.C. 1982).

Equal protection claims seeking to correct the inequalities among townships must succeed in arguing that the Indiana statute, as applied by the 1008 township trustees, discriminates among geographical classifications of people and that the classification is not rationally related to any legitimate state interest. Trustee defendants will challenge that argument by claims that the geographical fragmentation of the poor relief system is rationally related to the state interest in maintaining local control over poor relief.[127] Indeed, according to proponents of the Indiana system, the system is a good one precisely because control of eligibility and benefits at such a local level allows trustees to meet the needs of the poor in a flexible, efficient manner.[128]

Rosenberg was skeptical that any equal protection action to correct intertownship inequality could succeed under a rational basis scrutiny, noting that perfect geographical equality of government services is certainly too much to expect.[129] Although it may be too much to ask that city parks in Terre Haute be identical to the city parks in Indianapolis,[130] it does not seem to be too much to ask the state to provide evenhanded administration of a program that provides food and shelter to the poor. Furthermore, it does not seem too much to ask that courts be able to distinguish between the two.[131] Nonetheless, Rosenberg's skepticism is as well founded today as it was twenty years ago. It is unlikely that the Equal Protection Clause offers a remedy for intertownship inequality in poor relief.

B. Equal Privileges Among Townships

More constitutions than one protect the rights of individuals. "The federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials."[132]

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127. *See* Rosenberg, *supra* note 46, at 415-17.

128. *See* Howard M. Smulevitz, *Laissez Welfaire*, INDIANAPOLIS STAR, Sept. 22, 1991, at F1 (quoting a trustee: "This is what's great about the (trustee) system, you have flexibility.").

129. Rosenberg, *supra* note 46, at 416.

130. A comparison proposed by Rosenberg. *See* Rosenberg, *supra* note 46, at 416.

131. *See* Dandridge v. Williams, 397 U.S. 471, 520-22 (1970) (Marshall, J., dissenting) (suggesting a higher level of scrutiny for cases involving benefits necessary for sustaining life); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, 578 n.73 (4th ed. 1991). The court has not adopted such a standard, *id.* at 754, and in the absence of Justices Marshall and Brennan (the only justice joining in Justice Marshall's dissent), it is unlikely to do so soon.

132. People v. Brisendine, 531 P.2d 1099, 1113 (Cal. 1975).

For intertownship inequality in poor relief to survive, it must pass scrutiny not only under the Fourteenth Amendment, but also under the corresponding state constitutional provision, the Equal Privileges Clause.[133]

At least one state examines inequality in welfare benefits more closely under its state constitution than under the federal constitution. In Montana, equal protection claims under the state constitution are reviewed under a mid-level scrutiny when the discrimination affects welfare benefits.[134] The justification for the higher level of review lies in the state charter itself: The Montana Constitution provides for welfare benefits.[135] The middle-tier scrutiny adopted by the Montana court is similar to that suggested by Justice Marshall[136] in his dissent to *Dandridge v. Williams*.[137]

Might Indiana also invoke state constitutional analysis which provides broader rights than does the federal approach? The notion of state constitutional rights which are broader than federal constitutional rights is certainly not novel in Indiana. Chief Justice Shepard of the Supreme Court of Indiana has pointed out "a fine line of cases in which the Indiana Supreme Court held that the Indiana Bill of Rights afforded Hoosiers rights which the federal Constitution did not."[138]

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133. IND. CONST. art. 1, § 23. "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

Intertownship inequality in poor relief might also be attacked under IND. CONST. art. 4, § 23, which requires that "all laws shall be general, and of uniform operation throughout the State." However, the standard of review under IND. CONST. art. 4, § 23 is the same as the standard of review under IND. CONST. art. 1, § 23. Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 597 (Ind. 1980). Therefore, a challenge to intertownship inequality under IND. CONST. art. 4, § 23, appears to be identical to an attack on a geographical classification under the Equal Privileges Clause. This Note considers only the latter.

Another argument which might be made, but is not considered here, is that placing the authority to create eligibility and benefit standards at the discretion of the trustees without the protection of the usual administrative rulemaking procedures is an unconstitutional delegation of legislative authority under IND. CONST. art. 4, § 1. *See* Dortch v. Lugar, 266 N.E.2d 25, 49-50 (Ind. 1971).

134. Butte Community Union v. Lewis, 712 P.2d 1309, 1311 (Mont. 1986). *See generally* Scott C. Wurster, Note, *Butte Community Union v. Lewis: A New Constitutional Standard for Evaluating General Assistance Legislation*, 48 MONT. L. REV. 163 (1987).

135. The Montana Supreme Court refused to hold that the state constitution created a fundamental right for purposes of equal protection analysis. *Butte Community Union*, 712 P.2d at 1311.

136. Wurster, *supra* note 134, at 168-69.

137. 397 U.S. 471, 508-30 (Marshall, J., dissenting).

138. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, Address to the Annual Meeting of the Indiana Civil Liberties Union (Sept. 17, 1988), *in* 22 IND. L. REV. 575, 577 (1989).

However, Chief Justice Shepard did not mention the Equal Privileges Clause. In Indiana case law "[t]here are a myriad of Indiana cases in which the two provisions have been considered in unison."[139] The Indiana Supreme Court has held, "[i]t is well established that the rights intended to be protected under both constitutional provisions are identical."[140]

Hammer v. State[141] was perhaps the first case to set forth a rationale for the holding that the Equal Privileges Clause and the Equal Protection Clause are identical.[142] Hammer was convicted for wearing the badge or emblem of a secret society incorporated by the state in violation of a state statute reserving to society members the right to wear such insignia. Hammer appealed, challenging the constitutionality of the statute under the Equal Protection Clause of the Fourteenth Amendment and under Article 1, Section 23 of the Indiana constitution. Considering the relationship between the two provisions the court commented,

> Section 23 of the [Indiana] Bill of Rights is the antithesis of section 1, art. 14, of the federal Constitution, for, while the latter operates upon states to prevent abridgment by the states of constitutional rights of citizens of the United States, Section 23 prevents the state from granting privileges or immunities . . . [that] shall not equally belong to all citizens. One section prevents the curtailment of the constitutional rights of citizens, and thus prohibits the enlargement of the rights of some in discrimination against others, but, so long as all are treated alike under like circumstances, neither section is violated.[143]

The above passage can be taken to mean that the Equal Privileges Clause protects precisely the same rights as those protected by the Equal Protection Clause of the Fourteenth Amendment, no more and no less. The statute in question did not violate the federal constitution, and therefore, it did not violate the state constitution.

In *Sidle v. Majors*[144] the Indiana Supreme Court described the relationship between the state Equal Privileges Clause and the federal

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139. State *ex rel.* Miller v. McDonald, 297 N.E.2d 826, 829 (Ind. 1973), *cert. denied*, McDonald v. Miller, 414 U.S. 1158 (1974).

140. Haas v. South Bend Community Sch. Corp., 289 N.E.2d 495, 501 (Ind. 1972). *Accord* State *ex rel.* Miller v. McDonald, 297 N.E.2d at 829. The Seventh Circuit, Huff v. White Motor Corp., 609 F.2d 286, 298 (7th Cir. 1979), and the Indiana Court of Appeals, *see, e.g.*, Gary Community Mental Health Ctr., Inc. v. Indiana Dep't of Pub. Welfare, 507 N.E.2d 1019, 1023 n.3 (Ind. Ct. App. 1987); Frame v. South Bend Community Sch. Corp., 480 N.E.2d 261, 265 (Ind. Ct. App. 1985), have followed.

141. 89 N.E. 850 (Ind. 1909).

142. *Id.* at 852-53.

143. *Id.* (citing Cory v. Carter, 48 Ind. 327 (1874); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899)).

144. 341 N.E.2d 763 (Ind. 1976).

Equal Protection Clause in essentially the same way it did much earlier in *Hammer v. State*. "[W]e see no differences in the equal protection provisions of the state and federal constitutions. Both are designed to prevent the distribution of extraordinary benefits or burdens to any group."[145]

Therefore, the current state of Indiana Constitutional law is that the Equal Privileges Clause of the Indiana Constitution protects exactly the same rights as those protected by the Equal Protection Clause of the Fourteenth Amendment. An attempt to alleviate unequal poor relief among the townships which fails under the federal constitution will also fail under the state constitution, unless new ground is broken in Indiana Constitutional analysis.

However, it is not inevitable that the law continue to develop the way it has. The almost syllogistic conclusion of the *Hammer* court that the two provisions are identical ignores significant textual and historical differences between the two clauses.[146] In fact, one of the cases cited in *Hammer*, *Cory v. Carter*,[147] held that the Equal Privileges Clause, which is seventeen years older than the Fourteenth Amendment, was "not intended for persons of the African race"[148] because those persons were not "citizens" as the word is used in Article 1, Section 23,[149] despite an acceptance that the Fourteenth Amendment made them citizens of any state in which they were residents.[150] All this provides curious historical footing for the modern position that the rights intended to be protected by equal protection and equal privileges are the same.[151]

There is more to build on than textual and historical distinctions. In *Reilly v. Robertson*,[152] the supreme court maintained that it will not blindly follow Fourteenth Amendment law in interpreting Article 1, Section 23, of the Indiana Constitution.

> It has been established by this Court that the rights intended to be protected by Art. 1, § 23, of the Indiana Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are identical. . . . This does not mean, however, that federal cases interpreting the Equal Protection Clause are binding upon this Court in making an

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145. *Id.* at 767.

146. Patrick Baude, *Is There Independent Life in the Indiana Constitution?*, 62 IND. L.J. 263, 270-71 (1987).

147. 48 Ind. 327 (1874).

148. *Id.* at 340.

149. *Id.* at 340-41.

150. *Id.* at 358.

151. *See* Baude, *supra* note 146, at 270-71.

152. 360 N.E.2d 171 (Ind. 1977), *cert. denied*, 434 U.S. 825 (1977).

> interpretation of the Indiana Constitution. Our interpretation of a state constitutional provision is an independent judicial act of this Court, and in making that judgment, federal cases have only persuasive force.[153]

The supreme court then discussed separately the minimum standards for the Equal Protection Clause and the Equal Privileges Clause.[154]

At least two other cases provide the seed for a distinct standard of review for the Indiana Constitution. In *Steup v. Indiana Housing Finance Authority*[155] the court upheld a statute granting benefits to persons at or below 125% of the poverty level against attacks under both the Fourteenth Amendment and Article 1, Section 23.[156] The court first set forth the standard of review under the federal constitution. For cases which do not involve a suspect classification, the standard is whether there is "any rational foundation for the discrimination."[157] "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[158] The court used different language to describe state constitutional analysis. "Under Article 1, § 23 of the Indiana Constitution, 'a classification, to be valid, must be based on substantial distinctions which make one class so different from another as to *suggest the necessity* for different legislation with respect thereto.'" (emphasis added).[159]

Davis Construction Co. v. Board of Commissioners,[160] quoted in *Steup*, was a case decided solely on the basis of Article 1, Section 23.

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153. *Id.* at 175 (citing Haas v. South Bend Community Sch. Corp., 289 N.E.2d 495 (Ind. 1972) and Midwestern Petroleum Corp. v. State Bd. of Tax Comm'rs, 187 N.E. 882 (Ind. 1933)). *Accord*, City of Indianapolis v. Wright, 371 N.E.2d 1298, 1300 (Ind. 1978), *appeal dismissed*, 439 U.S. 804.

154. 360 N.E.2d at 174-75.

155. 402 N.E.2d 1215 (Ind. 1980).

156. *Id.* at 1222-23.

157. *Id.* at 1222 (quoting Loving v. Virginia, 388 U.S. 1, 9 (1967)).

158. *Id.* at 1222 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

159. *Id.* at 1222-23 (quoting Davis Construction Co. v. Bd. of Comm'rs, 132 N.E. 629, 631 (Ind. 1921)). *But see* Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585 (Ind. 1980). In *Johnson*, decided only weeks after *Steup*, the supreme court described judicial scrutiny under Art. 1, § 23, as "whether the legislative classification is based upon substantial distinctions with reference to the subject-matter." *Id.* at 597. While the court maintained the connection between the classification and the subject of the legislation, the distinction between classes must be only substantial; the requirement that the distinction between classes suggest a necessity for unequal treatment was not mentioned. *Id. Accord*, Rohrabaugh v. Wagoner, 413 N.E.2d 891, 894 (Ind. 1980).

160. 132 N.E. 629 (Ind. 1921).

In *Davis*, the General Assembly had passed a statute granting relief to certain construction contractors who became unable to fulfill their obligations to the state because of conditions during World War I. The group of contractors to which the relief was granted was very small and "could not [have been] more clearly pointed out if they were mentioned by name."[161] The supreme court held that the classification was unconstitutional under Article 1, Section 23, and expressly reserved the question of federal constitutionality.[162]

Reilly, *Steup*, and *Davis*, if taken in isolation, provide a foundation for the development of a minimum standard of review for the Indiana Bill of Rights which is subtly different than the minimum standard for the Fourteenth Amendment. Under the Fourteenth Amendment a classification must be merely rationally related to a legitimate state interest, but under a test implied by *Davis* and *Steup*, the classes must be so distinct as to suggest a *necessity*[163] for treating them differently with respect to the subject matter of the legislation.[164] Although *Davis* and *Steup* might be developed into a test slightly more stringent than classic low scrutiny, it would probably not be the same as the middle tier of *Craig v. Boren*,[165] and probably not the same as the standard advocated by Justice Marshall.[166] Where the *Craig v. Boren* test focuses on the importance of the state's interest, under *Steup* and *Davis* a court would examine the nature of the classification and its relationship to the objective of the legislation. Where Justice Marshall advocated a test which balances the interests of the state against the interests of the plaintiff in receiving the benefits, a test which is inherently sensitive to the nature of the benefit provided by the legislation, nothing in *Davis* and *Steup* suggests such a balancing.

The justification for examining some classifications more rigorously under state constitutional analysis than under federal analysis lies in the textual difference between the two clauses: privileges versus protection. Both *Steup* and *Davis* deal with benefits or privileges: low-income housing in *Steup* and the cancellation of contractual obligations under *Davis*. Sometimes the distinction between privileges and protection may be

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161. *Id.* at 631.

162. *Id.*

163. *Id.* at 631; *Steup*, 402 N.E.2d at 1222-23.

164. Reilly v. Robertson, 360 N.E.2d 171, 175 (Ind. 1977), *cert. denied*, 434 U.S. 825 (1977).

165. 429 U.S. 190 (1976). The *Reilly* court also considered the *Craig v. Boren* standard separately from the Art. 1, § 23 standard of review. 360 N.E.2d at 175.

166. Dandridge v. Williams, 397 U.S. 471, 520-22 (1970) (Marshall, J., dissenting) (suggesting a higher level of scrutiny for cases involving benefits necessary for sustaining life).

difficult to discern, and sometimes a case will involve a privilege for one class of people, working against protection of the law for another. Nonetheless, the framers of the Indiana Constitution used substantially different words than did those who drafted the Fourteenth Amendment, and any justification for interpreting the two clauses differently will likely flow from those differences in words.

Dramatic intertownship inequality in poor relief could not withstand review under a standard that asks whether it is necessary to have disparate levels of benefits provided in different townships in order to achieve the purpose of the statute. While it might be necessary to provide for local variations in the cost of providing basic subsistence, gross disparities that go beyond those variations would not be upheld. The suggested standard would not, however, threaten all classifications in the granting or administration of welfare. For example, eligibility guidelines which meet the *Van Buskirk*[167] standards[168] would pass muster as did the income guideline in *Steup*.[169]

However, the common thread that runs through *Davis*, *Reilly*, and *Steup* has not been isolated by Indiana courts, but rather it lies woven into the tapestry of cases which hold that there is no difference between the two constitutional provisions. *Reilly* has been interpreted as standing simply for the general proposition that federal constitution decisions are not binding for Indiana Constitutional decisions.[170] Cases following *Steup* have frequently diluted the wording of the standard of review under Article 1, Section 23, omitting the requirement of a "necessary" classification.[171] *Davis* is relatively obscure and seldom cited by Indiana courts, and its analysis has also been equated with federal analysis.[172] Absent expansion of the Equal Privileges Clause, it offers no more protection than the federal constitution.

C. *The Role of* Van Buskirk *in Alleviating Intertownship Inequality*

Perhaps none of this discussion of the applicability of the principles equal protection and equal privileges would be necessary if trustees

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167. State *ex rel.* Van Buskirk v. Wayne Township, 418 N.E.2d 234 (Ind. Ct. App. 1981).

168. *See supra* section II.B.

169. Steup v. Indiana Housing Fin. Auth., 402 N.E.2d 1215, 1222-23 (Ind. 1980).

170. Priest v. State, 386 N.E.2d 686, 689 (Ind. 1979). In fact, it has been cited for the proposition that the two clauses are equivalent. *See, e.g.*, Championship Wrestling, Inc. v. State Boxing Comm'n, 477 N.E.2d 302, 304 (Ind. Ct. App. 1985).

Perhaps *Reilly*'s true contribution is to establish that Art. 1, § 23, can provide adequate and independent state grounds to escape review by the United States Supreme Court. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (holding that the Supreme Court will review state court decisions when there are no adequate and independent state grounds).

171. *See supra* note 159.

172. Vicory v. State, 400 N.E.2d 1380, 1383 (Ind. 1980).

followed the principles established by the *Van Buskirk* court. If eligibility and benefit standards truly reflected the local cost of providing basic subsistence and were generous enough to actually deliver that type of relief, then the issues of disparity among the townships would disappear. To have local poor relief decisions made with the genuine purpose of meeting basic needs of the poor and to have the standards by which those decisions are guided to be established by realistic evaluation of the local costs of providing those needs would go far in eliminating unfairness and intertownship inequality from poor relief.

V. Reform

Advocates for poor relief reform suggest at least two changes—one modest, the other more sweeping.

The more modest proposal is for the township trustees to adopt state-wide standards which can be adjusted for local variation in costs, substantiated by evidence such as market surveys.[173] The adoption of guidelines such as those proposed by the Metropolitan Poor Relief Administration Council[174] would significantly enhance the fairness and equality of poor relief administration while leaving trustees with enough discretion to adapt relief to local needs and conditions.

The more sweeping proposal, one dependent on political rather than judicial reform, is to integrate the administration of general assistance with the administration of the categorical assistance programs.[175] Such an approach has advantages beyond the creation of fairness within the general assistance program. These advantages include increased administrative efficiency and simplified accessibility to recipients.[176]

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173. Families in Poverty, *supra* note 24, at 87.

174. The Metropolitan Poor Relief Administration Council was created by the Indiana General Assembly and assigned the duty of developing poor relief guidelines for eligibility, benefits, and trustee accessibility. Ind. Code § 12-2-1-15-1 to -6 (Supp. 1991).

175. Families in Poverty, *supra* note 24, at 88.

176. *Id.* Allegations that trustees are inefficient at delivering government services are not new. The following scathing attack on trustees was written over sixty years ago at a time when township trustees had many more responsibilities than they do today.

> The maintenance of obsolete forms of local government is costing Indiana citizens millions of wasted dollars annually. The state board of accounts . . . can not prevent county commissioners from purchasing worthless gravel at twice the price other commissioners are paying for good gravel. Yet on the whole, county commissioners are performing a better service than township trustees. If any officers have vindicated their abolition it is township trustees. Township trustees are constantly managing less mileage of roads but constantly at a higher cost. Township trustees are spending startling sums of money for poor relief. In one county it is said seven doctors were paid $83,000 for charity medical cases. A separate county government and several township governments within a city are unnecessary and expensive.

Hugh E. Willis, *Revision of the Indiana Constitution*, 5 Ind. L.J. 329, 347 (1930).

The judicial restrictions to trustee discretion are maturing very slowly.[177] Two decades passed between *Goldberg v. Kelly* and *Center Township v. Coe*. According to critics of the poor relief system, the unfairness and inequality described by Rosenberg twenty years ago still exists. Because poor relief is essentially a legislative issue, the best hope for removing arbitrariness and inequality from general assistance in Indiana is through legislative reform such as the adoption of eligibility and benefit guidelines that are uniform across the state.

VI. Conclusion

A line of judicial decisions has placed constitutional restrictions on the discretion of the township trustee in the administration of poor relief in Indiana. The earlier cases established that poor relief applicants and recipients have a right to due process and that due process requires the use of written, objective standards in the adjudication of poor relief applications. A later case, *Van Buskirk*, intruded further on trustee discretion by requiring the standards to be based on evidence of the local cost of basic subsistence. The most recent case, *Center Township v. Coe*, explicitly invoked constitutional restrictions on the substantive aspects of a trustee's discretion, holding that a trustee violated his client's right to Equal Protection and Equal Privileges by providing unequal benefits to different classes of people within his township.

Center Township v. Coe is likely the high water mark for constitutional restriction of trustee discretion. The Equal Protection Clause probably will not provide a guarantee of equality in poor relief among townships, and neither will the Equal Privileges Clause unless it is expanded by the Indiana Supreme Court. *Van Buskirk* may prove to be the strongest guarantee of uniformity across township lines in that each trustee must formulate eligibility and benefit standards with an eye toward the local cost of basic subsistence. If unfairness and inequality are to be eliminated from Indiana poor relief, it will have to be done by the General Assembly.

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177. In some instances judicial impact on the poor relief system has been not only slow but almost completely ineffective. Eddleman v. Center Township of Marion County, 723 F. Supp. 85 (S.D. Ind. 1989) was the *second* decision to hold unconstitutional the residency requirement for poor relief eligibility. The first, which was generally ignored, was Major v. Van Dewalle, Civil No. 4169 (N.D. Ind. Dec. 10, 1969). *See Eddleman*, 723 F. Supp. at 88-89; Rosenberg, *supra* note 46, at 388.

Federal Court Jurisdiction in Civil Forfeitures of Personal Property Pursuant to the Comprehensive Drug Abuse Prevention and Control Act

Karen L. Fisher*

Introduction

Civil forfeiture under the Comprehensive Drug Abuse Prevention and Control Act[1] has become surrounded by much controversy, since the Reagan Administration's introduction in March 1988 of a zero-tolerance policy in the war on drugs. Since then, federal and state drug enforcement activities have included the increasing use of civil forfeiture as a means of deterring illegal drug trafficking, punishing drug dealers and users, and providing additional revenues for the war on drugs. Under the Drug Control Act, a person may forfeit any real or personal property used to facilitate the manufacture, transportation, sale, or possession of illegal drugs or property acquired with proceeds connected with drug trade.[2]

This Note will focus on federal civil procedure in cases involving forfeiture of personal property pursuant to the Drug Control Act. The issue considered is whether execution of a civil forfeiture judgment should extinguish federal courts' jurisdiction, thereby precluding a claimant from seeking relief from an adverse judgment. Personal property, especially intangibles, is of particular interest because the situs, or jurisdictional location, of such property is movable and often difficult to ascertain.

Civil forfeiture cases under the Drug Control Act traditionally have followed in rem admiralty procedures. Under admiralty rules, the court's jurisdiction continues only so long as it maintains physical control over the property. Hence, the court loses jurisdiction once it executes judgment. However, in recent years, several circuits instead have asserted in personam jurisdiction over the government as plaintiff, thereby preserving a losing claimant's right of appeal after execution of the judgment.

Civil forfeiture is a harsh remedy that deprives an owner of private property without the necessity of a criminal conviction. By requiring conformance with admiralty procedures, courts have added to this substantive harshness a layer of unnecessarily complex procedures, creating

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1. 21 U.S.C. § 881 (1988, Supp. I 1989 & Supp. II 1990).
2. *Id.* § 881(a).

an action that often results in inequity. The courts created procedural rules of admiralty in the nineteenth century to prevent ship owners from sailing out of port and leaving an injured plaintiff remediless when the court was unable to obtain personal jurisdiction over the ship's owner. However, in federal civil forfeiture actions, inequity results when the application of these rules leaves the claimant-owner remediless by denying the same right of appeal that is readily available to the losing party in nonadmiralty civil suits.

Before considering federal civil procedure in forfeiture cases brought under the Drug Control Act, it is necessary to discuss both the historical origins of admiralty procedure in civil forfeiture actions and the components of a court's jurisdiction. This Note then will examine both the traditional *in rem* admiralty rule and the modern *in personam* rule and consider statutory support for the modern rule.

I. A Brief History of Civil Forfeiture

A forfeiture is "a divestiture of specific property without compensation," and, more specifically, the "[l]oss of some right or property as a penalty for some illegal act."[3] At an early stage in its development, the English common law personified inanimate objects. This fictitious device produced the in rem action in which a complainant brought suit against the offending object. At early common law, any object causing a person's death was subject to forfeiture to the Crown in an action known as the deodand.[4]

Throughout history, seagoing vessels often have been referred to as live beings. Even today, ship owners name their vessels in a christening celebration. Therefore, it is not surprising that suits in admiralty are frequently in rem actions against the vessel. This makes even more sense when one considers that nineteenth century United States courts almost never could obtain personal jurisdiction over a foreign ship owner. Hence, the courts created procedural rules of admiralty to prevent ship owners from sailing out of port and leaving the injured plaintiff remediless.[5]

The courts superimposed admiralty rules upon the substantive concept of the deodand, creating civil forfeiture actions dissimilar to substantive admiralty law but which nonetheless utilize the procedural rules of admiralty. Federal civil forfeiture cases under the Drug Control Act

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3. Black's Law Dictionary 650 (6th ed. 1990).

4. *See* Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death, and the Western Notion of Sovereignty*, 46 Temp. L.Q. 169 (1973).

5. *See* Oliver W. Holmes, Jr., The Common Law 23-30 (Mark D. Howe ed., 1963) (1881).

traditionally have been placed into this hybrid category of actions.[6] However, four circuits have rejected this peculiar synthesis, instead applying the Federal Rules of Civil and Appellate Procedure.[7]

II. An Overview of In Rem Jurisdiction

Jurisdiction is the power or authority of a court to act with respect to a given case.[8] To adjudicate an action a court must have jurisdiction over both the subject matter and the parties to the action.[9] One example of subject matter jurisdiction is the power of a court to review the decisions of other courts, known as appellate jurisdiction.

A. Traditional Classifications of Jurisdiction Over the Parties to an Action

Jurisdiction over the parties traditionally is divided into three types: in personam, quasi in rem, and in rem.[10] In personam jurisdiction empowers the court to issue a judgment against a person or legal entity.[11] In rem jurisdiction is jurisdiction over a thing ("res"), and the res is the defendant over which the court exercises power.[12] Quasi in rem jurisdiction is a hybrid of in personam and in rem jurisdiction. Whereas in rem actions determine the interests of all persons in the world to the res, quasi in rem actions "determine the claims of particular specified persons in the property."[13]

"The essential function of an action in rem is the determination of title to or the status of property located within the court's jurisdiction. Conceptually, in rem jurisdiction operates directly on the property[,] and the court's judgment is effective against all persons who have an interest in the property."[14] Chief Justice Holmes, in *Tyler v. Judges of the Court of Registration*,[15] noted in the opinion for the Supreme Judicial

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6. *See infra* note 35 and accompanying text.
7. *See infra* note 108 and accompanying text.
8. *See generally* Robert C. Casad, Jurisdiction in Civil Actions ¶ 1.01 (1983 & Supp. 1986).
9. *Id.* at 1-2.
10. *Id.* ¶¶ 1.01[2] & 1.01[3].
11. *Id.* ¶ 1.01[2], at 1-5.
12. *Id.* ¶ 1.01[3], at 1-7.
13. *Id.* ¶ 1.01[3], at 1-8 (footnote omitted).
14. 4 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1070, at 422 (2d ed. 1987). *See also* Restatement (Second) of Judgments § 30 (1982). "In . . . actions by the government to forfeit a thing used in violation of the revenue or other laws, . . . a court may enter a final judgment purporting to bind all persons in the world with respect to interests in the property (traditionally described as a judgment 'in rem')." *Id.* cmt. a, at 304-05.
15. 55 N.E. 812, 814 (Mass.), *writ of error dismissed*, 179 U.S. 405 (1900).

Court of Massachusetts that "[a]ll proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected."[16] Examples of in rem actions include actions to quiet title to real property, actions under land registration statutes, in rem libels in admiralty, and probate court decisions.

B. Elements of Jurisdiction over the Parties to the Action

Jurisdiction over the defendant (whether the defendant is a person or a thing) is based upon two elements: basis and process.[17] Process relates to service of process for in personam actions and to attachment or seizure of the res in quasi in rem and in rem actions.[18]

Historically, the basis of jurisdiction over the defendant in any action was the physical presence of the defendant within the court's territorial domain.[19] However, for in personam actions, although physical presence is still a valid basis for jurisdiction,[20] the focus has shifted during the last fifty years toward the existence of minimum contacts between the forum and the defendant.[21] A similar shift has occurred in quasi in rem actions.[22] However, the basis of presence still governs traditional in rem admiralty cases,[23] because the court's in rem power derives entirely from physical control over the res.[24] This divergence between the bases of minimum contacts for in personam and quasi in rem actions and presence for in rem actions has elicited much commentary.[25]

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16. 55 N.E. at 814.

17. CASAD, *supra* note 8, ¶ 1.01[2][a], at 1-5.

18. For a discussion of process, see *id.* ¶ 2.03.

19. McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power . . . ."); Pennoyer v. Neff, 95 U.S. 714 (1878).

20. Burnham v. Superior Court of Cal., 495 U.S. 604 (1990).

21. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

22. Shaffer v. Heitner, 433 U.S. 186 (1977).

23. The [U.S. Supreme] Court has not yet addressed specifically the question of whether minimum contacts [instead of presence] also should be the controlling standard in true in rem cases, but the structure of the *Shaffer* opinion strongly suggests that it is intended to apply to true in rem as well as quasi-in-rem cases.

4 WRIGHT & MILLER, *supra* note 14, § 1073, at 446 (footnote omitted). However, even if the Court intended *Shaffer* to apply to all in rem actions, lower courts typically have refused to apply it in admiralty cases. George Arceneaux III, Note, *Has Shaffer v. Heitner Been Lost at Sea?*, 46 LA. L. REV. 141 (1985).

24. Pennington v. Fourth Nat'l Bank, 243 U.S. 269 (1917) (action by husband challenging seizure of bank account to satisfy decree for alimony). *See generally* 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 9.01[5] (1991 & Supp. June 1991).

25. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950) (citations omitted):

Distinctions between actions in rem and in personam are ancient and

III. Pretrial Procedure in Civil Forfeiture Actions Under the Drug Control Act

"Attorneys commit fatal procedural errors more often in civil forfeiture cases than in any other category of civil litigation."[26] This may be due to the highly complex nature of the procedure governing such cases.[27] At the onset of a federal civil forfeiture action, a federal agency, either the Drug Enforcement Agency (DEA) or Federal Bureau of Investigation (FBI), will notify the owner of the impending forfeiture. The owner may seek administrative remedy by filing a petition for remission within thirty days of receipt of notice.[28] However, the agency's decision on the petition for remission does not address the merits[29] and is "virtually unreviewable" by a court.[30]

Federal law grants the federal district courts original, exclusive subject matter jurisdiction over civil forfeiture proceedings arising under federal law.[31] To obtain judicial review, the property must have an appraised value in excess of $500,000.[32] In addition, the claimant must file a claim and bond with the federal agency within twenty days after receipt of notice.[33] The agency then will transfer the case to the appropriate trial court. Because federal civil forfeiture cases under the Drug Control Act

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> originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own. The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification.
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> . . .
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> [W]e think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally . . . .

But see Hanson v. Denckla, 357 U.S. 235, 246 (1958) ("The basis of [in rem] jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State.") (citations omitted).

26. Anton R. Valukas & Thomas P. Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It with You*, Litig., Winter 1988, at 31.

27. For a detailed discussion of this procedure, see United States v. United States Currency in the Amount of $103,387.27, 863 F.2d 555 (7th Cir. 1988). *See also* Thomas J. Schoenbaum, Admiralty and Maritime Law § 20-3 (practitioner's ed. 1987).

28. 21 C.F.R. § 1316.79-.81 (1992).

29. The agency will consider the good faith or lack of knowledge of the petitioner but not whether the property is properly subject to forfeiture. 28 C.F.R. § 9.5 (1991).

30. United States v. United States Currency in the Amount of $2,857.00, 754 F.2d 208, 214 (7th Cir. 1985). *See, e.g.*, United States v. One 1973 Buick Riviera Auto., 560 F.2d 897 (8th Cir. 1977).

31. 28 U.S.C. §§ 1345, 1355 (1988).

32. 19 U.S.C. § 1607 (1988 & Supp. II 1990); 21 C.F.R. § 1316.77-.78 (1992).

33. 21 C.F.R. § 1316.75-.76 (1992).

traditionally have been placed into the category of actions that are governed by the procedural rules of admiralty,[34] the action proceeds according to the Supplemental Rules for Certain Admiralty and Maritime Claims. The government serves a verified complaint and seizes the property (if it has not already done so). The claimant must file a verified claim within ten days and an answer within twenty days after service.[35]

IV. Post-Trial Procedure in Civil Forfeiture Actions Under the Drug Control Act: The Traditional Rule

Under traditional in rem admiralty rules, upon receiving an unfavorable judgment, the claimant must file not only a timely notice of appeal,[36] but also a motion to stay execution of the judgment before the expiration of the automatic ten-day stay afforded by the Federal Rules of Civil Procedure, Rule 62(a). According to admiralty law precedent, the res is no longer jurisdictionally before the court once the court releases it to the prevailing party.[37] Therefore, the losing party must obtain a stay of execution of the adverse judgment to preserve its right to appeal or to seek a new trial. Furthermore, one court even has held that, if the trial court denies the motion to stay execution, the would-be appellant must seek and obtain a stay from the appellate court to preserve in rem jurisdiction.[38] Only by filing a supersedeas bond may the claimant-appellant obtain a stay as of right.[39]

The traditional admiralty rule posits that execution of the judgment results in removal of the res from the court's jurisdiction, because the court's power derives entirely from control over the res.[40] In *Pennington v. Fourth National Bank*,[41] the United States Supreme Court held that "[t]he only essentials to the exercise of the State's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard."[42] This traditional rule was more recently confirmed by the Court of Appeals for the Ninth Circuit, which said:

> The strong weight of authority . . . has held that in an *in rem* admiralty proceeding where a vessel is the *res* and no stay

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34. *See infra* note 44 and accompanying text.
35. Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C.
36. Fed. R. App. P. 4(a)(1).
37. *See infra* notes 40-43 and accompanying text.
38. Taylor v. Tracor Marine, Inc., 683 F.2d 1361 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1012 (1983).
39. Fed. R. Civ. P. 62(d).
40. *See supra* note 24 and accompanying text.
41. 243 U.S. 269 (1917).
42. *Id.* at 272.

> of execution has been applied for, the release or removal of the vessel from the jurisdiction of the court destroys *in rem* jurisdiction and renders moot any appeal from decisions of the trial court concerning the vessel.[43]

This rule relating to seagoing vessels has been transmogrified onto land and applied by four circuit courts of appeal to civil forfeiture proceedings.[44] *United States v. One Lear Jet Aircraft*,[45] a six-to-five en banc decision of the Eleventh Circuit, is the leading case. It involved a forfeiture proceeding under the federal statute prohibiting importation of illegal aliens.[46] Leybda Corporation intervened as claimant to the defendant airplane. After a trial, the court rendered a judgment of forfeiture to the government. Upon expiration of the automatic ten-day stay of judgment, the plane was moved outside the Eleventh Circuit. Leybda filed a timely notice of appeal but did not seek a stay of the judgment or file a supersedeas bond.[47]

The majority based its decision upon admiralty precedent, dismissing the appeal for lack of in rem jurisdiction because the res was absent from the territorial jurisdiction of the court at the time of the appeal.[48] Furthermore, the majority rejected the argument that the court had in personam jurisdiction over the parties because the government subjected itself to the court's jurisdiction when it brought the forfeiture action as the plaintiff.[49] Rather, the court held that "the action was solely *in rem*."[50]

The United States Supreme Court has recognized an exception to the traditional rule: When the court releases the res through "accidental or fraudulent or improper removal," in rem jurisdiction is not destroyed.[51]

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43. American Bank of Wage Claims v. Registry of Dist. Court of Guam, 431 F.2d 1215, 1218 (9th Cir. 1970) (footnote omitted). *Accord, e.g.*, Bank of New Orleans & Trust Co. v. Marine Credit Corp., 583 F.2d 1063 (8th Cir. 1978).

44. United States v. Tit's Cocktail Lounge, 873 F.2d 141 (7th Cir. 1989) (per curiam); United States v. $10,000 in United States Currency, 860 F.2d 1511 (9th Cir. 1988); United States v. One Lear Jet Aircraft, 836 F.2d 1571 (11th Cir.) (en banc) (6-5 decision), *cert. denied*, 487 U.S. 1204 (1988); United States v. $79,000 in United States Currency, 801 F.2d 738 (5th Cir. 1986).

45. 836 F.2d 1571 (11th Cir.), *cert. denied*, 487 U.S. 1204 (1988).

46. 8 U.S.C. § 1324(b) (1988).

47. 836 F.2d at 1572-73.

48. *Id.* at 1577.

49. *Id.* at 1576-77.

50. *Id.* at 1577.

51. The Rio Grande, 90 U.S. (23 Wall.) 458, 465 (1874) (illegal removal of steamboat from district court's territorial jurisdiction pending appeal did not destroy appellate jurisdiction). *Cf. The Brig Ann*, 13 U.S. (9 Cranch) 289, 290-91 (1815) (dictum) (tortious or fraudulent removal will not divest jurisdiction).

The majority in *One Lear Jet* acknowledged this exception but held that the facts of *One Lear Jet* did not fall within it.[52] Although this exception to the traditional rule may appear relatively straightforward, "the correct application of the test to particular facts is far from self evident."[53]

In *United States v. $10,000 in United States Currency*,[54] the trial court entered a default judgment of forfeiture against the defendant cash, which had been seized by the United States Customs Service when the claimant failed to report the sum as required upon leaving the United States.[55] The district court denied the claimant relief from the default on the grounds that the forfeited cash had already been released to the government, and, therefore, the court lacked in rem jurisdiction.[56]

The court of appeals recognized the possibility that *Shaffer v. Heitner*[57] might require the application of the minimum contacts standard in in rem actions.[58] However, the court in *$10,000* refused to address the issue of whether the government becomes subject to the court's in personam jurisdiction when it brings a civil forfeiture action as the plaintiff.[59] Instead, it reversed and remanded for further consideration of whether the case fell within the "accidental or fraudulent or improper removal" exception to the traditional admiralty rule.[60] Therefore, the court did not categorically reject the modern in personam rule; it merely decided to dispose of this case on other grounds.

In *United States v. Tit's Cocktail Lounge*,[61] the Seventh Circuit endorsed the traditional rule. Because the claimants-appellants failed to file timely claims, the court entered default judgments against them. The judgment was not stayed, and most of the forfeited property, consisting of real estate and businesses located thereon, was then sold.[62] The court of appeals dismissed the appeal as to those properties already sold.[63]

However, the facts of this case are rather limiting. The res in *Tit's Cocktail Lounge* consisted primarily of real property. Hence, this case leaves unanswered the question of whether the Seventh Circuit has adopted the traditional rule in cases involving personal property; that

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52. 836 F.2d at 1574 n.2.

53. 1 SMITH, *supra* note 24, ¶ 9.01[5][c], at 9-20. *See, e.g.*, United States v. $10,000 in United States Currency, 860 F.2d 1511 (9th Cir. 1988).

54. 860 F.2d 1511.

55. 31 U.S.C. § 5316 (1988).

56. 860 F.2d at 1513.

57. 433 U.S. 186 (1977).

58. *See supra* notes 22-23.

59. 860 F.2d at 1513.

60. *See supra* notes 51-53 and accompanying text.

61. 873 F.2d 141 (7th Cir. 1989) (per curiam).

62. *Id.* at 142-43.

63. *Id.* at 144.

is, whether an in rem action against real estate differs fundamentally from one against personalty because the situs of real property for jurisdictional purposes is immutably fixed.[64]

Furthermore, although the Seventh Circuit cited the traditional rule as justification for its decision,[65] the court dismissed the appeal only as to those properties already sold at the time of appeal. Under the traditional rule as described above, the court should have held that it lost jurisdiction over all of the property, without regard to whether it had been sold to a third party. Hence, the decision in *Tit's Cocktail Lounge* is strikingly similar to *United States v. Aiello*,[66] in which the Second Circuit adopted the modern rule, upholding jurisdiction as to funds over which the government still retained control, but dismissing the appeal as to forfeited property already sold.

Lastly, the court's discussion in *Tit's Cocktail Lounge* centers on procedural distinctions between civil and criminal forfeiture actions concerning notice and hearing requirements.[67] The court did not explain why the government was not subjected to the court's in personam jurisdiction because it brought the civil forfeiture action as the plaintiff.

In *United States v. $79,000 in United States Currency*,[68] the Fifth Circuit also endorsed the traditional rule. However, the claimants in this case did not argue that the government was subject to the court's in personam jurisdiction. Rather, they asserted that the government acted in bad faith when it released the defendant cash to United States Customs after expiration of the automatic ten-day stay, even though the claimants did not attempt to obtain a stay of execution.[69] Because the facts of the case clearly did not fall within the "accidental or fraudulent or improper removal" exception to the traditional admiralty rule, the court dismissed the appeal.[70] Not surprisingly, the court did not address *sua sponte* the controversial issue of personal jurisdiction over the government;[71] hence, this case does not necessarily preclude future debate over the modern in personam rule in the Fifth Circuit.

Overall, the appellate decisions supporting the application of traditional in rem admiralty rules in civil forfeiture proceedings have limited precedential value as persuasive authority. Although the majority opinion

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64. *See* United States v. Certain Property Belonging to Hayes, 943 F.2d 1292, 1295 (11th Cir. 1991).

65. 873 F.2d at 143.

66. 912 F.2d 4 (2d Cir. 1990); *see infra* notes 125-28 and accompanying text.

67. 873 F.2d at 143-44.

68. 801 F.2d 738 (5th Cir. 1986).

69. *Id.* at 739.

70. *Id.* at 740.

71. *Id.*

in *One Lear Jet* is well-reasoned,[72] the en banc court was split and the dissenting opinions have been heavily relied upon by other circuits in later decisions.[73] The Ninth Circuit in *United States v. $10,000 in United States Currency* expressly declined to address the issue of personal jurisdiction over the government.[74] Instead, it disposed of the case on the grounds that the facts might fall within the "accidental or fraudulent or improper removal" exception to the traditional admiralty rule. *Tit's Cocktail Lounge* addressed only the issue of jurisdiction over real property that had already been sold to a third party.[75] Lastly, because the claimants-appellants in *United States v. $79,000 in United States Currency* failed to raise the issue of personal jurisdiction over the government, the Fifth Circuit did not expressly reject the modern rule.[76]

V. Criticisms of the Traditional Rule

The traditional in rem admiralty rule is inequitable, illogical, and outdated. The dissenting judges in *One Lear Jet* denounced the traditional rule, and even the United States Supreme Court has questioned the validity of fictitious personification of inanimate objects.[77] Furthermore, the traditional rule often leads to results that lack facial validity when procedure takes priority over substance.

A. The One Lear Jet *Dissenters*

Three separate dissents were filed by the five-judge minority in *One Lear Jet*.[78] Subsequent decisions in other circuits have relied on these opinions in formulating the modern rule discussed in Section VII below. All of the dissenters urged the court to reject the traditional in rem admiralty rule.

The late Judge Vance criticized the majority opinion as effectively eliminating the right of appeal in many civil forfeiture proceedings.[79] He asserted that financial ability to post a bond should not determine whether an unsuccessful claimant has the right to appeal an adverse judgment, particularly because ordinary civil judgments may be appealed

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72. *See supra* notes 45-50 and accompanying text.

73. *See infra* text accompanying notes 121 & 127.

74. *See supra* notes 54-60 and accompanying text.

75. *See supra* notes 61-67 and accompanying text.

76. *See supra* notes 68-71 and accompanying text.

77. *See* Shaffer v. Heitner, 433 U.S. 186, 205-07, 212 (1977); Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23-26 (1960).

78. The dissenting opinions were authored by Judges Vance, Clark, and Edmondson, respectively. *See United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1577-84 (11th Cir.) (en banc) (6-5 decision), *cert. denied*, 487 U.S. 1204 (1988).

79. 836 F.2d at 1577 (Vance, J., dissenting).

without a bond. Judge Vance further asserted that it defies "ordinary common sense" for the United States, which initiated the action, to be able to defeat the jurisdiction of a United States court by moving the res from one United States district to another.[80] He also criticized the majority opinion as a misapplication of admiralty precedent, agreeing with the other dissenters that the court obtained in personam jurisdiction over the government when it initiated the suit.[81]

Judge Clark contended in his dissent that "[b]inding precedent compels the conclusion that the court is obligated to hear this appeal."[82] The admiralty fiction of personifying a ship originated to preserve the court's jurisdiction by permitting the suit to proceed when in personam jurisdiction over the ship's owner could not be obtained.[83] Judge Clark argued that there was no support in admiralty precedent for using this fiction to defeat rather than to preserve a court's jurisdiction.[84] Rather, both he and Judge Edmondson maintained that the appeal should be heard because the court had in personam jurisdiction over the government.[85]

B. Fictional Personification of the Res

Even courts adhering to the traditional admiralty rules have recognized that "[j]urisdiction *in rem* is predicated on the 'fiction of convenience' that an item of property is a person against whom suits can be filed and judgments entered."[86]

In *Continental Grain Co. v. Barge FBL-585*,[87] the United States Supreme Court noted that "[t]he fiction relied upon has not been without its critics even in the field it was designed to serve [admiralty]."[88] The Court in *Continental Grain* observed that the fiction had been called "archaic," "an animistic survival from remote times," "irrational," and "atavistic."[89] In *Shaffer v. Heitner*,[90] a quasi in rem action, the Court echoed these criticisms, reasoning that:

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80. *Id.* at 1578.

81. *Id.*

82. *Id.* at 1580 (Clark, J., dissenting).

83. *Id.* at 1580-81 (citing Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23-24 (1960)).

84. *Id.* at 1581.

85. *Id.* at 1583-84 (Clark & Edmondson, JJ., dissenting).

86. United States v. $10,000 in United States Currency, 860 F.2d 1511, 1513 (9th Cir. 1988) (citing Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 22-23 (1960)).

87. 364 U.S. 19 (1960).

88. *Id.* at 23.

89. *Id. See also* The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959) (5-4 decision) (Harlan, J., dissenting) (asserting that the purpose of a distinction between in personam and in rem actions "is impossible to grasp").

90. 433 U.S. 186 (1976).

> [T]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.[91]

C. Procedure Taking Priority over Substance

After the res is released from the court's custody to the prevailing party, either it remains within the district court's territorial jurisdiction, or it is removed. The outcome of several cases in jurisdictions adhering to the traditional rule has hinged upon this factual distinction, thereby conditioning the existence of in rem jurisdiction on the caprice of the prevailing party.[92]

In *United States v. Four Parcels of Real Property*,[93] the United States government sought forfeiture of a dozer purchased by J.C. Pate, Jr., a convicted drug dealer. The claimant, Donald Daniel, asserted that Pate purchased the dozer as Daniel's agent with money from Daniel's legitimate logging business. The district court granted summary judgment in favor of Daniel. The dozer then was released to Daniel after he "filed an affidavit promising that he would keep the dozer within the territorial jurisdiction of the district court so long as any proceedings in the case were pending."[94]

On an appeal taken by the government, the Court of Appeals for the Eleventh Circuit considered "whether the release of the res from custody deprives [the appellate court] of in rem jurisdiction over an appeal concerning the res when the res remains within the territorial jurisdiction of the court."[95] In two earlier cases, the court reached different results in answering similar questions, and the court in *Four Parcels* declined to resolve the conflict between these two binding cases.[96] The court in *United States v. One 1983 Homemade Vessel Named "Barracuda,"*[97] had held that it retained in rem jurisdiction so long as the res remained within the court's territorial jurisdiction, even though

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91. *Id.* at 212.

92. United States v. Four Parcels of Real Property, 941 F.2d 1428 (11th Cir. 1991); United States v. One 1983 Homemade Vessel Named "Barracuda," 858 F.2d 643 (11th Cir. 1988); The Manuel Arnus, 141 F.2d 585 (5th Cir.), *cert. denied*, 323 U.S. 728 (1944).

93. 941 F.2d 1428 (11th Cir. 1991).

94. *Id.* at 1435 (footnote omitted).

95. *Id.*

96. *Id.* at 1436.

97. 858 F.2d 643 (11th Cir. 1988).

the final judgment had been executed and the res, a fishing boat, had been sunk by the government.[98] The court in *The Manuel Arnus*[99] held that in rem jurisdiction was defeated as soon as the res was released from the custody of the court, even though the res remained within the court's territorial jurisdiction.[100] Rather than resolving this conflict, the court in *Four Parcels* distinguished these two cases, by holding that Daniel's affidavit preserved in rem jurisdiction over the appeal.[101]

These three cases exemplify the unnecessary legal convolutions which courts adhering to the traditional rule have undertaken.[102] In *Four Parcels*, the court, although attempting to avoid an obsolete geographical distinction, conditioned the existence of appellate jurisdiction upon the stipulation of the prevailing party. However, federal subject matter jurisdiction[103] cannot be conferred, nor its absence waived, by the parties' consent.[104] The unfortunate results of these esoteric distinctions are that the merits of the case get short shrift and the process of litigation is unnecessarily prolonged.

VI. Evolution of the Modern Rule

Several circuits have recognized a second exception to the traditional admiralty rule: "[W]here there is an 'interface of *in rem* and *in personam* jurisdiction,' a court may properly exercise broad *in personam* power over the parties to the *in rem* action."[105] This exception does not apply when the in personam action against the owner is criminal, because,

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98. *Id.* at 647.

99. 141 F.2d 585 (5th Cir.), *cert. denied*, 323 U.S. 728 (1944). *The Manuel Arnus* was binding precedent because the Eleventh Circuit "adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981." *Four Parcels*, 941 F.2d at 1436 n.16.

100. *The Manuel Arnus*, 141 F.2d at 586.

101. 941 F.2d at 1436.

102. Complicating matters further, the Eleventh Circuit recently held that in rem jurisdiction over real property is defeated when the res is sold pursuant to a judgment of forfeiture, even though real property obviously must remain within the court's territorial jurisdiction. United States v. Certain Property Belonging to Hayes, 943 F.2d 1292, 1294 (11th Cir. 1991).

103. Appellate jurisdiction is a type of subject matter jurisdiction. Casad, *supra* note 8, ¶ 1.01[1], at 1-3.

104. Mitchell v. Maurer, 293 U.S. 237, 244 (1934); People's Bank v. Calhoun, 102 U.S. 256, 260-61 (1880). *See also* Schoenbaum, *supra* note 27, § 20-3, at 621 ("Despite some authority to the contrary, the parties ought not be able to confer *in rem* jurisdiction by agreement.") (footnote omitted).

105. United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1576 (11th Cir.) (en banc) (6-5 decision) (quoting Inland Credit Corp. v. M/T Bow Egret, 552 F.2d 1148, 1152 (5th Cir. 1977)), *cert. denied*, 487 U.S. 1204 (1988). *Accord* United States v. An Article of Drug Consisting of 4,680 Pails, 725 F.2d 976, 982-84 (5th Cir. 1984).

"even though criminal and civil forfeiture proceedings are often brought in conjunction, they remain independent of each other. Consequently, the in personam criminal action does not provide personal jurisdiction in the in rem civil action."[106]

The main point of contention under this exception is whether the court in a civil forfeiture action has in personam jurisdiction over the government because it subjects itself to the court's jurisdiction when it brings a forfeiture action as the plaintiff. If the court does have in personam jurisdiction, arguments about the situs of the res and the physical power of the court over the res then become irrelevant. The relevant question becomes whether the United States government has established minimum contacts with the district in which the action is tried. As discussed in Section VII below, the First, Second, and Fourth Circuits have held that, merely by bringing suit, the government does establish sufficient minimum contacts to sustain an assertion of personal jurisdiction.

When this exception is narrowly construed, it does little to expand the court's jurisdiction; in personam jurisdiction will exist only when the government simultaneously commences an in rem action against the res and a civil in personam action against its owner. However, when broadly construed, this exception essentially engulfs the entire rule. Merely by bringing a civil forfeiture action, the government becomes subject to the court's in personam jurisdiction, even if the owner is not subject to the court's in personam jurisdiction because the action was commenced only in rem against the res.[107]

VII. Application of the Modern Rule

The modern rule is a rejection of the ancient admiralty precepts, allowing the claimant to challenge or appeal a judgment regardless of whether it filed a supersedeas bond or motion for stay of execution, so long as it filed a timely notice of appeal or motion to set aside the judgment. Four circuits have adopted the modern rule, repudiating the judicial fiction of in rem jurisdiction,[108] particularly when the government

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106. United States v. 1447 Plymouth, S.E., 702 F. Supp. 1356, 1359 (W.D. Mich. 1988) (citation omitted). *See also* 1 Smith, *supra* note 24, ¶ 2.03, at 2-10 ("'[T]he proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam*.'") (quoting The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827)).

107. *See One Lear Jet*, 836 F.2d at 1580-84 (Clark, J., dissenting).

108. United States v. One Lot of $25,721 in Currency, 938 F.2d 1417 (1st Cir. 1991); United States v. $1,322,242.58, 938 F.2d 433 (3d Cir. 1991); United States v. $95,945.18, United States Currency, 913 F.2d 1106 (4th Cir. 1990); United States v. Aiello, 912 F.2d 4 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991).

retains control of the res throughout the proceedings and after execution of judgment.

In two recent cases, *United States v. One Lot $25,721 in Currency*,[109] and *United States v. $1,322,242.58*,[110] decided within days of each other, the First and Third Circuits, respectively, rejected the traditional rule and adopted the modern rule. Both cases involved the forfeiture of cash proceeds from illegal drug trade. After reviewing prior cases on the subject, the First Circuit concluded that "[t]here is no good reason government should be allowed to insulate itself from the appellate process by wrapping itself in the mantle of an admiralty fiction designed at an earlier time to meet a problem totally unrelated to present day civil forfeiture proceedings."[111]

In *$25,721*, the claimant, John Mele, did not obtain a stay of execution of a summary judgment that awarded the defendant currency to the government. After the expiration of the automatic ten-day stay, the judgment was executed and the funds were deposited in the United States Department of Justice Asset Forfeiture Fund.[112] Mele appealed the forfeiture. Before affirming the summary judgment, the court considered whether it had jurisdiction to hear Mele's appeal. The court held that:

> [I]n a currency forfeiture case the government has subjected itself to the court's *in personam* jurisdiction and execution of the judgment by the government does not extinguish appellate jurisdiction if a timely appeal has been filed and the filing of a timely appeal makes the filing of a request for a stay of the district court judgment and the posting of a supersedeas bond unnecessary for jurisdictional purposes.[113]

In *$1,322,242.58*, the United States seized funds alleged to have resulted from illegal money laundering of drug proceeds by Reginald Whittington. Mr. Whittington and Road Atlanta, Inc. (a corporation in which Whittington owned a majority interest) intervened in the forfeiture proceeding. The trial court dismissed the claims of both Whittington and Road Atlanta for failure to comply with discovery orders. After the dismissal was entered, the funds were transferred from the Justice Department's Seized Asset Deposit Fund to the Justice Department's Asset Forfeiture Fund. Timely notices of appeal were filed by both Whittington and Road Atlanta.[114]

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109. 938 F.2d 1417 (1st Cir. 1991).
110. 938 F.2d 433 (3d Cir. 1991).
111. *$25,721*, 938 F.2d at 1419-20. *See generally* CASAD, *supra* note 8.
112. 938 F.2d at 1418.
113. *Id.* at 1420.
114. 938 F.2d at 435-37.

First, the court held that the admiralty rules regarding the geographic location of the res do not apply to an incorporeal res such as cash.[115] The court reasoned that geographic location is meaningless with regard to an incorporeal res: "[W]e cannot say that the obligation [to disburse the sum on deposit] does not exist in every part of the country."[116] Alternatively, the court held that, "[e]ven if all Treasury accounts are deemed by some fiction to be located at a place outside [this] District, . . . the *res* in this case left the District . . . when it was deposited into the Seized Asset Deposit Fund prior to forfeiture."[117] This removal of the res would be a proper shipment and would not destroy jurisdiction.[118]

In another case involving forfeiture of cash allegedly used to finance an illegal drug transaction, the Fourth Circuit rejected "an aquatic and dated legal fiction" in favor of the modern rule.[119] After the district court granted summary judgment for the government, the defendant funds were deposited into the United States Marshals Service Asset Forfeiture Fund. The claimant, Carlton Lee Baxter, appealed but did not obtain a stay of execution nor file a supersedeas bond.[120]

The court of appeals "agree[d] with the dissenters in *United States v. One Lear Jet Aircraft*[121] that by initiating the forfeiture proceeding in the district court, the government has subjected itself to [the] court's in personam jurisdiction."[122] The court reasoned that it would be inequitable to allow the government to escape the claimant's appeal after it had availed itself of the district court to seek a remedy from the defendant property.[123]

As the [U.S.] Supreme Court put it (in a different context), "The plaintiff having, by his voluntary act in demanding justice from the

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115. *Id.* at 437-38.

116. *Id.* at 438.

117. *Id.*

118. The Drug Control Act departs from traditional in rem procedure by permitting storage of the defendant property outside the district.

> (c) Whenever property is seized under any of the provisions of this title, the Attorney General may—
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> . . . .
>
> (2) remove the property to a place designated by him; or
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> (3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

21 U.S.C. § 881(c) (1988 & Supp. I 1989). *See generally* 1 SMITH, *supra* note 24, ¶ 9.01[3].

119. United States v. $95,945.18, United States Currency, 913 F.2d 1106, 1110 (4th Cir. 1990).

120. *Id.* at 1107.

121. *See supra* notes 78-85 and accompanying text.

122. 913 F.2d at 1109.

123. *Id.* (citing Inland Credit Corp. v. M/T Bow Egret, 552 F.2d 1148, 1152 (5th Cir. 1977)).

defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence."[124]

The Second Circuit in *United States v. Aiello*[125] has adopted the modern rule, at least in cases in which the government retains control of the res after execution of judgment. In a case involving forfeiture of property allegedly purchased with illegal drug proceeds, the trial court entered summary judgment for the government. After expiration of the automatic ten-day stay, the government made preparations to dispose of the forfeited property. The claimant then filed a motion in the district court for a stay, which was denied. "Several months later, during which no motion for a stay was made in [the appellate] Court, the Government sold two of the forfeited properties. After hearing oral argument, [the court of appeals] granted a stay pending disposition of the appeal."[126]

The court of appeals upheld jurisdiction as to those properties that had not been sold. Agreeing with the dissenters in *One Lear Jet*, the court observed:

> [T]he concepts of continuing territorial presence and control in forfeiture actions derive from the admiralty fiction of a ship's personality, a legal construct of dubious validity. With the force of those concepts diminishing in admiralty, they surely ought not to be routinely invoked to deny citizens an opportunity for appellate review of judgments forfeiting their property to the Government.[127]

The court in *Aiello* rejected the government's argument that the court had lost power over the forfeited funds that had been deposited into the United States Treasury, because the government still retained control over those funds. However, the court agreed that "a sale of forfeited property, in the absence of a stay of the forfeiture judgment, destroys appellate jurisdiction as to the sold property."[128]

The decisions of the First, Second, and Fourth Circuits[129] that in a civil forfeiture action the government has subjected itself to the court's

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124. *Inland Credit*, 552 F.2d at 1152 (quoting Adam v. Saenger, 303 U.S. 59, 67-68 (1938)).

125. 912 F.2d 4 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991).

126. *Id.* at 5.

127. *Id.* at 6-7 (citations omitted).

128. *Id.* at 7 (citing United States v. Tit's Cocktail Lounge, 873 F.2d 141, 144 (7th Cir. 1989) (per curiam)).

129. United States v. One Lot of $25,721 in Currency, 938 F.2d 1417 (1st Cir. 1991); United States v. $95,945.18, United States Currency, 913 F.2d 1106 (4th Cir. 1990); United States v. Aiello, 912 F.2d 4 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 757 (1991).

in personam jurisdiction are especially compelling in cases in which the res is intangible personal property, such as cash, because upon execution of the judgment the cash is merely transferred from one government account to another. Further, as held by the Third Circuit,[130] it is untenable to condition the existence of jurisdiction upon whether the situs of an incorporeal res is within the court's territorial jurisdiction, because geographic location is meaningless with regard to such a res.

However, the appellate decisions rejecting the traditional in rem admiralty rules in civil forfeiture proceedings have broader applicability. These cases support a conclusion that the court has personal jurisdiction over the government in all civil forfeiture cases in which the government initiated the proceeding and retained control over the res after execution of the judgment. Whether the res is tangible or intangible, it is unreasonable to permit the government to bring suit and then defeat the court's jurisdiction merely by moving the res. However, as was recognized by the court in *Aiello*, equitable considerations may prescribe a different outcome once the res is sold to a third party after the claimant has failed to obtain a stay of execution of the judgment.[131]

VIII. Statutory Support for the Modern Rule

The general venue provision for most federal civil forfeiture actions limits proper venue to the district in which the property is located or arrested.[132] However, Congress "radically altered [by expansion] the scope of territorial jurisdiction (venue)"[133] in subsection (j) of the Drug Control Act.[134] Several courts have held that this subsection (j) implicitly au-

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130. United States v. $1,322,242.58, 938 F.2d 433, 437-38 (3d Cir. 1991).

131. 912 F.2d at 7.

132. (b) A civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found.
(c) A civil proceeding for the forfeiture of property seized outside any judicial district may be prosecuted in any district into which the property is brought.
(d) A proceeding in admiralty for the enforcement of fines, penalties and forfeitures against a vessel may be brought in any district in which the vessel is arrested.
28 U.S.C. § 1395(b)-(d) (1988).

133. 1 Smith, *supra* note 24, ¶ 9.01[7], at 9-32.

134. In addition to the venue provided for in section 1395 of title 28, United States Code, . . . in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.
21 U.S.C. § 881(j) (1988 & Supp. I 1989).

thorizes nationwide service of process.[135] Furthermore, the Drug Control Act, contrary to traditional in rem procedure, permits storage of the defendant property outside the district in which the case is tried.[136]

Although the statutory provisions discussed above relate to venue and to storage of the res, they indicate a general legislative intent to broaden the procedural scope of actions under the Drug Control Act. Because it would effect an expeditious trial on the merits, this interpretation of congressional intent complements the announced policy of the United States Department of Justice to increase dramatically the number of such actions which are brought.[137] Furthermore, "Congress clearly has the power to dispense with the traditional jurisdictional requirement that the res be physically present within the district."[138] Therefore, it may be inferred that Congress intended appellate jurisdiction to survive execution of a judgment that results in removal of the res from the court's territorial jurisdiction.

IX. Conclusion

Unlike other civil suits, the claimant, not the government, carries the burden of proof in federal civil forfeiture actions under the Drug Control Act. "Once the government shows probable cause to believe that the property is subject to forfeiture, the claimant must establish by a preponderance of the evidence that the property is 'innocent' or otherwise not subject to forfeiture."[139] Much has been written about the

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135. United States v. Parcel I, 731 F. Supp. 1348, 1351-52 (S.D. Ill. 1990); United States v. 2050 Brickell Ave., 681 F. Supp. 309, 314 (E.D.N.C. 1988). *Contra* United States v. 11205 McPherson Lane, 754 F. Supp. 1483, 1487 (D. Nev. 1991) ("In the absence of Congressional legislation so providing, we cannot write into the statute a nationwide service of process provision."). The district court in *Parcel I* also held that "the venue statute controls territorial jurisdiction." 731 F. Supp. at 1351. However, this view has not gained widespread acceptance. *See 11205 McPherson Lane*, 754 F. Supp. at 1488.

136. *See supra* note 118.

137. *See Oversight of "High Risk" Asset Forfeiture Programs at the Justice Department and the Customs Service: Hearing Before the Senate Comm. on Governmental Affairs*, 101st Cong., 2d Sess. 114-24 (1990) (published in U.S. Department of Justice, Federal Forfeiture of the Instruments and Proceeds of Crime: The Program in a Nutshell).

138. 1 Smith, *supra* note 24, ¶ 9.01[7], at 9-33 (citing 19 U.S.C. § 1605 (1988); United States v. One 1974 Cessna Model 310R Aircraft, 432 F. Supp. 364, 367-68 (D.S.C. 1977)). *Cf.* United States v. One Lear Jet Aircraft, 836 F.2d 1571, 1575 n.4 (11th Cir.) (en banc) (6-5 decision) (agreeing that "Congress could modify the requirement that the *res* be within the court's territorial jurisdiction" but criticizing the court's conclusion in *One 1974 Cessna Aircraft* that Congress had so done), *cert. denied*, 487 U.S. 1204 (1988).

139. 1 Smith, *supra* note 24, ¶ 11.03, at 11-10 (footnote omitted).

constitutional implications of the substantive law of civil forfeiture.[140] Altogether, civil forfeiture is a harsh and often inequitable remedy, which severely penalizes the owner of the forfeited property.

By adding to this substantive harshness a layer of complicated and obscure procedure, the courts have created an action that often results in inequity. However, as Judge Vance noted in his dissent to *One Lear Jet*: "'Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.'"[141] Courts should not erect inequitable procedural barriers which prevent appellate review of the merits of a case, especially in civil forfeiture actions in which the government is dispossessing an owner of private property. Furthermore, these procedural issues have become critical because drug enforcement agencies have increased dramatically since 1988 the use of civil forfeiture as a weapon in the war on drugs.

Procedural rules of admiralty were created in the nineteenth century to prevent ship owners from sailing out of port and leaving the plaintiff remediless. This underlying rationale for the existence of these rules is wholly inapplicable to civil forfeiture. Frequently, the application of these rules in civil forfeiture cases leaves the claimant-owner remediless by denying the same right of appeal that is readily available to the losing party in other nonadmiralty civil suits. As persuasively argued by Judge Vance, principles of fairness, common sense, and logic support the conclusion that admiralty procedure has no place in civil forfeiture actions.[142] It is time for this nineteenth century fiction to be dry-docked.

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140. *See, e.g.*, John Brew, *State and Federal Forfeiture of Property Involved in Drug Transactions*, 92 DICK. L. REV. 461 (1988); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); Michael Schecter, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990).

141. 836 F.2d at 1578 (Vance, J., dissenting) (quoting United States v. One 1936 Model Ford V-8 DeLuxe Coach, 307 U.S. 219, 226 (1939) (citation omitted by court)).

142. *Id.* at 1577.

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BOOK REVIEW

"Grand Theory" and Constitutional Change

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We the People: Foundations. By Bruce Ackerman.** Cambridge, Mass: The Belknap Press of Harvard University Press., 1991. Pp. x, 369. Cloth, $24.95.

Introduction

As the first of a projected three-volume study of the American Constitution, *We the People: Foundations* introduces us to the author's theory of "dualist democracy."[1] Dualism is "grand theory" in the sense that it is offered as a comprehensive synthesis, both normative and descriptive, of American constitutional law. As grand theory, it must offer a satisfying solution to the master-problem of constitutional law: How shall we read our Constitution so that it is sufficiently stable and binding to serve as fundamental law, while still being sufficiently organic and dynamic to last over multiple generations? If its meanings are wholly malleable it cannot bind. If it binds too rigidly it cannot last.

For Ackerman, the solution begins with the recognition that the Constitution is uniquely American, and is historically rooted in a distinct tradition and evolving historical practice. His dualist hypothesis is therefore situated historically and is dynamic.

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1. We The People is, in a sense, the culmination of the author's evolving constitutional philosophy previously presented in shorter form. *See, e.g.*, Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453 (1989); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013 (1984).

This first volume, *Foundations*, is an elaboration and defense of his dualist thesis and a search for its roots at the founding of our nation. This search for historical confirmation culminates in a final chapter of justification: Dualism does and ought to inform our constitutional thought. The second volume, *Transformations*, will seek to confirm the dualist spirit by displaying its working through our constitutional history, especially at the crucial moments of Reconstruction and the New Deal.[2] The third volume, *Interpretations*, promises a fresh look back at our constitutional law, especially in the Supreme Court's hands, through the dualist scope.[3] Altogether, *We the People* has a prophetic vector for it looks to our future and to what can and should be done with our Constitution.

In a literal sense, Ackerman's project is incomplete and, therefore, in all fairness cannot be definitively judged. Yet, as this first volume fully lays out the dualist thesis, seeks to confirm its pedigree and defend its value, and foreshadows future volumes by way of example and sketch, at least tentative comments are in order.

And they have not been wanting. The Ackerman thesis and this book already have been much discussed.[4] Although broadly respectful, the commentary has generally ranged from challenging and skeptical to negative and even carping.

I will first set out the dualist model in a straightforward manner in Part I. In Part II I will distill the critical commentary. In Part III, I will attempt to come to grips with dualism as grand theory and to set Ackerman and his critics in some perspective.

I. Dualist Democracy

Ackerman is emphatic about the distinctive nature of our constitutional history. European categories will not capture our unique American experience, and their somewhat promiscuous application has befogged us. Only a careful attention to our tradition will reveal our constitutional essence.[5]

Ackerman uses what he deems to be the three prevailing schools of modern constitutional thought as foils for the introduction of his dualist thesis.[6] For the "monist,"[7] primacy must be given to popular democracy

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2. Bruce Ackerman, We the People, Foundations 44, 162 (1991).
3. *Id.* at 99, 162.
4. *See infra* Part II.
5. Ackerman, *supra* note 2, at 3.
6. *See* Ackerman, *supra* note 2, at 6-7 for a brief summary of the thesis.
7. Among the monists he includes Woodrow Wilson, James B. Thayer, Charles Beard, O. W. Holmes, Robert Jackson, Alexander Bickel, and John Hart Ely.

principally as it is manifested in a free and fair election process. Electoral winners have plenary authority, and any checks upon that authority are "presumptively antidemocratic."[8] Hence, judicial review of the political branches—the counter-majoritarian difficulty—is a discomfiture the monist is never quite able to resolve.[9]

For "foundationalists,"[10] by contrast, democratic principles, although honored, "are constrained by deeper commitments to fundamental rights."[11] Rights trump the decisions of the democratic institutions.[12] If for foundationalists the counter-majoritarian difficulty does not cause great anxiety, they must meet charges of being antidemocratic, rootless, vague, and elitist.[13]

Finally, what Ackerman labels the historicist or "Burkean" school prescribes a common law approach to the constitution that is strongly precedential, organic, and evolutionary.[14] Although himself a historicist of a sort, Ackerman accuses the Burkeans of a misplaced distrust of popular democracy and a blindness to the essential role of principles and transformative moments in the American constitutional experience.[15]

Each school then prizes a crucial aspect of our constitutional thought—democracy, rights and tradition—but is in some senses defective and incomplete. Democratic dualism holds the key.

Political decisions must be understood as operating on two tracks: that of "normal politics" and that of "higher politics." The existing government controls in the first setting, the People in the second. The great portion of our lives is lived in the atmosphere of normal politics.[16] The ordinary political institutions—periodic elections, public officials, public and private interest groups, bureaucracy, the media, and political parties—grapple for advantage and votes. The ordinary voter or citizen spends most energy and time as a private citizen going about his or her private life. With respect to the public sphere the average citizen is only

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8. ACKERMAN, *supra* note 2, at 8.

9. Ackerman suggests that the monist views the British parliamentary design as "the essence of democracy" and takes considerable pains to argue the competing virtues of the American system in the American context.

10. Among the Foundationalists, Ackerman lists Richard Epstein, Ronald Dworkin, Owen Fiss, John Rawls and Robert Nozick.

11. ACKERMAN, *supra* note 2, at 11.

12. The Foundationalist is apt to invoke Kant and Locke and other western philosophic resources.

13. ACKERMAN, *supra* note 2, at 12.

14. ACKERMAN, *supra* note 2, at 17.

15. For Ackerman's depiction of a Burkean justice at work, *see* Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991).

16. *See, e.g.*, ACKERMAN, *supra* note 2, at 230-65.

half-attentive, remotely engaged and imperfectly informed. Private interests remain dominant, and the citizen's vote, if he or she votes, is "soft."[17] Elections are held and the government governs (that is, engages in "normal lawmaking") but does not represent, in any deep sense, the People.[18] At best the elected officials are stand-ins or temporary licensees of the People.[19] Therefore, a successful polity must economize on its evocation of civic virtue because the People cannot sustain their role as public citizens for any extended period.[20]

Only very rarely do the People speak in their sovereign capacity, but when they do, we have switched to the "higher lawmaking" track.[21] In the broad interims between episodes of higher lawmaking the Supreme Court performs a special role as preserver: It safeguards against government depredations upon the periodic decisions of the People as sovereign.[22] In so doing, the Court must look back and see what the People have wrought in their moments of higher lawmaking.[23]

Before examining the sources and consequences of the dualist thesis, it is well to note how it purports to resolve the defects of the dominant schools previously described. Like the monist, the dualist accords primacy to the People, but only in the infrequent context of higher lawmaking. Like the foundationist, the dualist honors fundamental rights as trumping normal political decisions. Although ultimately the People define, create and abolish the fundamental law, they do so only when operating on the special plane of higher lawmaking for only then do they exhibit true civic virtue . The Court is now seen as, far from being antidemocratic, the very palladium of popular sovereignty. Yet it is not set on a free philosophical quest for the right and the good. Rather it must examine the constitutional tradition, seen not through Burkean eyes as merely an incremental growth, but as growth informed by principle and punctuated by the rare "jurisgenerative" event when the People engage in higher lawmaking.[24] The dualist synthesis then appears to preserve the major emphasis of the prevailing schools at the same time that it purports to resolve their dilemmas.

Is dualism "true"? What does it do for us?[25]

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17. ACKERMAN, *supra* note 2, at 240.
18. ACKERMAN, *supra* note 2, at 6.
19. ACKERMAN, *supra* note 2, at 181-86, 236.
20. ACKERMAN, *supra* note 2, at 198.
21. *See* ACKERMAN, *supra* note 2, at 266-94.
22. ACKERMAN, *supra* note 2, at 86-87.
23. ACKERMAN, *supra* note 2, at 86-94.
24. *See* ACKERMAN, *supra* note 2, at 44.
25. In assaying Ackerman's answers to these questions it is well to keep in mind that two-thirds of his project is yet to be completed.

For Ackerman dualism truly captures the essential nature of our original constitution. The principal support for this claim is built upon a close reading of the *Federalist,* which he deems to "represent the Founders' most reflective effort."[26] The key to discerning the dualist nature of the Federalist vision is to be discovered in Publius' solution to the revolutionry's dilemma:[27] Having achieved power, how does one justify consolidation of the revolutionary movement without succumbing to revolutionary amnesia or falling victim to escalating or permanent revolution?[28] In particular, how does one justify the extra-legal nature of the Constitution of 1787? Publius' central response is found in *The Federalist No.* 40, in which James Madison transcends his somewhat feeble legal arguments and his somewhat discomfiting appeal to exigency by positing a third defense. The convention mode of drafting and popular ratification are, far from illegal or merely extra-legal, in fact the supra-legal means by which the People speak in their sovereign capacity upon "solemn and authoritative" occasions.[29] In dualist parlance it is the stage of higher lawmaking. What is particularly crucial for Ackerman is that the door to such jurisgenerative events is never closed by the Constitution. This open-ended aspect of higher lawmaking is critical because the founding, contrary to the popular "bicentennial myth," is only the first of three such jurisgenerative moments in our history.[30] Each of these moments involved a transformative event in which we underwent fundamental constitutional change apart from, one might say, above and beyond, the classical recourse to Article V. Acknowledging the legitimacy of such moments opens up our constitutional future.

How are we to recognize these moments of higher lawmaking, these departures from normal politics? Such times are marked by four stages. The first involves the "signaling" of a desire for important change.[31] The signaling period evokes a broad, deep, and decisive shift in the approach to politics of a significant number of voters. They now become truly deliberative and rise above their normal half-attentive, self-centered state. This stage is followed by concrete proposal, an effort to implement the operative aspects of the change.[32] The third stage involves the high deliberation in which an array of citizens are mobilized as the institutions

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26. *See* ACKERMAN, *supra* note 2, at 167.

27. ACKERMAN, *supra* note 2, at 200-29.

28. ACKERMAN, *supra* note 2, at 169-71.

29. *See* ACKERMAN, *supra* note 2, at 195. *See also* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, CH. VIII (1965) (constitutional convention as perhaps the foremost American contribution to politics).

30. ACKERMAN, *supra* note 2, at 36.

31. ACKERMAN, *supra* note 2, at 272.

32. ACKERMAN, *supra* note 2, at 266.

of government contend over the desirability and wisdom of change.[33] Finally, if the change wins sufficient, broad support, the final stage of codification witnesses the incorporation of the shift into our fundamental law.[34] In short, what has happened is constitutional amendment, modern style, as an alternative to the classical, Article V mode of change.[35]

Beyond the founding, two moments in history stand out as moments of successful higher lawmaking—Reconstruction[36] and the New Deal.[37] From the traditional perspective, each of these episodes shares with the founding an aura of dubious legality.[38] Recognition of the truly transformative nature of these moments shatters the "bicentennial myth" or dominant "professional narrative," which sees our constitutional past as flowing steadily from the single creative event of the founding, although importantly punctuated by the Civil War Amendments, the failure of the post-Reconstruction Court, and the judicial rediscovery of constitutional truth in the 1930s. Ackerman, the dualist, marks out three transformative times, each ushering in a new constitutional regime. "Reconstruction was just that: the rebuilding the Union from the ground up,"[39] a process in which Article V was paid only lip service as the amending process was truly nationalized and the national government was put forward as the guarantor of rights. The New Deal introduces the third regime in which the activist national state is consolidated without even a formal nod at Article V. For Ackerman, of course, the dualist perspective reveals these moments as involving wholly appropriate modes

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33. ACKERMAN, *supra* note 2, at 385.

34. ACKERMAN, *supra* note 2, at 288.

35. ACKERMAN, *supra* note 2, at 267-68. Ackerman suggests an addition to Article V that would codify this modern mode of amendment:

> During his or her second term in office, a President may propose constitutional amendments to the Congress of the United States; if two-thirds of both Houses approve a proposal, it shall be listed on the ballot at the next two succeeding Presidential elections in each of the several states; if three-fifths of the voters participating in each of these elections should approve a proposed amendment, it shall be ratified in the name of the People of the United States.

ACKERMAN, *supra* note 2, at 54-55. This proposal, which Ackerman never takes great pains to support, does, however, capture his notion of the modern "plebiscitarian presidency" and the crucial role of the People. The states, of course, cease to have a function except as polling places.

36. ACKERMAN, *supra* note 2, at 44.

37. ACKERMAN, *supra* note 2, at 47.

38. *See* ACKERMAN, *supra* note 2, at 50. Making the case for these moments as truly transformative is apparently the task of the next volume, TRANSFORMATIONS. Ackerman also sketches an episode of a "failed constitutional moment"—President Reagan's constitutional ambitions being "rejected in the battle precipitated by his nomination of Robert Bork." Also see ACKERMAN, *supra* note 2, at 84, in which the author discusses the "failed moment" of William Jennings Bryan.

39. ACKERMAN, *supra* note 2, at 44.

of constitutional change, as "solemn and authoritative" moments when the People, as sovereign, operate above normal law. Crucially, he exhorts us to see that constitutional creativity is a reserved capacity of the People, ongoing and ever available.[40]

In addition Ackerman's three regime narrative provides a different perspective of our constitution past by fashioning "a model of interpretation which can do justice to the complexity of American judicial practice."[41] The interpretive impact he captures in a happy metaphor:

> Think of the American Republic as a railroad train, with the judges of the middle republic [i.e., post Reconstruction] sitting in the caboose, looking backward. What they see are the mountains and valleys of dualist constitutional experience, most notably the peaks of constitutional meaning elaborated during the Founding and Reconstruction. As the train moves forward in history, it is harder for the judges to see the traces of volcanic ash that marked each mountain's political emergence onto the legal landscape. At the same time, a different perspective becomes more available: as the second mountain moves into the background, it becomes easier to see that there is now a mountain range out there that can be described in a comprehensive way.
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> This changing perspective over time is the engine driving the shift from particularistic to comprehensive synthesis. As this shift is occurring, lots of other things are happening. Old judges die, and new ones are sent to the caboose by the engineers who happen then to be in the locomotive. These new judges' views of the landscape are shaped by their own experiences of life and law—as well as the new vistas constantly opened up on the mountains by the path that the train takes into the future. The distinctive thing about the judges of the middle republic is that they remained in the caboose, looking backward—not in the locomotive arguing over the direction the train should be taking at the next crossroads, or anxiously observing the passing scene from one of the passenger cars. Doubtless, the relationship between the mountains in the mountain range will be seen differently over time. The crucial question is whether it is fair to view the judges of the middle republic as engaged in this process of retrospective synthesis.[42]

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40. *See* ACKERMAN, *supra* note 2, at 319, in which the plea for conscious constitutional change is made most emphatically; *see generally id.* at 295-322.

41. ACKERMAN, *supra* note 2, at 159; *see also id.* at 63-66, 101, 142 (recasting of the place of Lockner v. New York, 198 U.S. 45 (1905) and Plessy v. Ferguson, 163 U.S. 537 (1896) decisions).

42. ACKERMAN, *supra* note 2, at 98-99.

Each regime is layered upon the past and requires a new synthesis. At first the new is particularized and confined to the particular context from which it grew. Over time, as the moment recedes and old book learning loses influence, the broad, underlying principles emerge and are applied. The Court's task is to determine what is new and what remains from prior regimes. Thus, if at first, as in the *Slaughter-House*[43] Cases, the Civil War amendments were confined to the newly freed, over time the broad commitment to equality and process inherent in the amendments was grasped. Ackerman provides a pair of demonstrations of the modern interpretative synthesis in his acute analysis of the *Brown v. Board of Education*[44] and *Griswold v. Connecticut*[45] cases.[46] Thus, he revisions *Griswold*, especially Justice Douglas' opinion for the Court, as a synthesis of regime one's emphasis on rights, regime two's turn to the national government as primary guarantor of rights, and a recognition of the critical role privacy must play against regime three's activist state.[47]

The book closes with an iteration of the arguments for dualism—among them the Federalists' ever valid insight on the shortage and inconstancy of civic virtue.[48] Ackerman rejects the notion that the Framers somehow betrayed the Revolution of 1776. Rather their end product, the Constitution, was a culmination of the revolutionary ideals annealed in the heat of lived experience.[49] Although suggesting the inescapable nature of our constitutional tradition, he concludes, without denying episodes and patterns of injustice, that our dualist democracy is a good thing not least because it provides an engine for change.[50]

Perhaps enough has been said to suggest the richness of Ackerman's book. It is in essence an optimistic, but open-eyed, essay celebratory of the American constitutional experience. But, for all that, it has not been altogether well-received.

II. The Critics

Historian Edmund Morgan clearly likes Ackerman's book, praising it as "a fresh and convincing view not only of our constitutional history but of our will to believe."[51] Although Morgan leaves room for possible

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43. 83 U.S. (16 Wall.) 36 (1873).

44. 347 U.S. 483 (1954).

45. 381 U.S. 479 (1965).

46. A full-scale display and application of the dualist interpretive synthesis is apparently the task of volume three, *Interpretations*.

47. Ackerman, *supra* note 2, at 150.

48. Ackerman, *supra* note 2, at 311.

49. Ackerman, *supra* note 2, at 200.

50. Ackerman, *supra* note 2, at 321.

51. Edmond Morgan, *The Fiction of the People*, *in* The New York Review of Books 46, 48 (1992) (book review).

disagreement with particulars, he concludes that Ackerman's central "distinction between normal and constitutional politics fits the way in which American government has operated over two centuries."[52]

Ackerman's legal compeers have not been so generous. Terence Sandalow finds the book "inflated, self-important, and self-congratulatory."[53] He judges the history too schematic[54] and the role of citizens in higher politics unconvincing.[55]

Indeed, much criticism has focused on Ackerman's (mis)use of history. At best it is seen as controversial[56] or "flawed,"[57] at worst it is "simplistic",[58] "mired in a fictional past"[59] or just "discredited."[60] In particular, his reading of *The Federalist* is charged as overly-aggressive and as providing but a slim or slender reed of support for his dualist thesis.[61]

Michael Klarman deems his readings of *Brown* and *Griswold* to be "fantasy"[62] and his explication of *Plessy* to rest on a distorted history.[63] Sanford Levinson criticizes Ackerman's failure to wrestle with the difference between interpretation and amendment.[64]

More fundamentally, the reviewers doubt whether he has really resolved the countermajoritarian difficulty or made the prescriptive case for the deliberative ideal which informs dualism.[65] Indeed, for Sherry, his thesis is, at bottom, "trivial."[66]

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52. *Id.*; *see also* Leif Carter, Book Review, 16 *Legal Stud. F.* 111 (1992). Carter, a political scientist, also has general praise for the book.

53. Terence Sandalow, *Abstract Democracy: A Review of Ackerman's We The People*, 9 CONST. COMM. 309 (1992) (book review).

54. *Id.* at 318.

55. *Id.* at 326.

56. David R. Dow, *Where Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 47 (1990).

57. William W. Fisher, III, *The Defects of Dualism*, 59 U. CHI. L. REV. 955, 956 (1992) (book review).

58. Suzanna Sherry, *The Ghost of Liberation Past*, 105 HARV. L. REV. 918, 919 (1992) (book review).

59. *Id.* at 918.

60. Fisher, *supra* note 57, at 973.

61. Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 776 (1992) (book review); *see also,* Fisher, *supra* note 57, at 964.

62. Klarman, *supra* note 61, at 785.

63. Klarman, *supra* note 61, at 787.

64. Sanford Levinson, *Accounting For Constitutional Changes (Or, How Many Times Has The United States Constitution Been Amended? (A) <26; (B) 26; (C) >26; (D) all of the above)*, 8 CONST. COMM. 409, 430 (1991) (book review).

65. *See* Dow, *supra* note 56; Fisher, *supra* note 57, at 968, 978; Sandalow, *supra* note 53, at 330; Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187, 1190, 1197 (1992) (book review).

66. Sherry, *supra* note 58, at 927.

The final dismissal of Ackerman and his dualist theory is accomplished with a variety of labels: he's a plain old activist;[67] an originalist, a utopian, a liberal on the ropes;[68] an originalist whose obeisance to the past is "fundamentally conservative."[69]

Why this chilly rejection of dualism, especially in the face of warm praise from such an eminent historian as Edmund Morgan? Is it perhaps that there lately has been a surfeit of grand theory with its inherent essentialism; that, at least among legal scholars, grand theory is on the rocks? Perhaps we are seeing a return to more modest tasks for legal scholars. If so, that might be all for the good. Yet grand theory may still have a useful role.

III. The Uses and Abuses of Grand Theory

Ackerman's dualist thesis may be regarded as "grand theory." By grand theory I mean "comprehensive normative theories of constitutional law"[70] that, among other things, seek to justify the institution of judicial review within a democratic system. Such theory seeks to enlighten us about the nature of our constitutional law and while normative in purpose, its justification rests upon some discovered truths in our constitutional past.

What, then, should we expect from grand theory? Must it be comprehensive, pure, internally coherent and, above all, true?[71] Ackerman's critics seem to demand as much—some crystalline, hard, elegant code-cracking theorem, essentialist in nature and ultimately resistant to critique,—the equivalent, as it were, of "grand unified theory" in the physical sciences. Is that to expect too much, or is it to expect the wrong thing? Certainly many of the criticisms we have canvassed are telling and some of the epithets and labels do fit in the loose way such labels fit, but it is not the critical points so much, if at times they seem carping, but the dimissive tone of the reviews that may be said to be beside the point and ungenerous.

Grand theories are and ever will be more humble affairs than critics (and theorists) like to think. In law grand theory will never deliver on its promise if we take its promise to be inarguable truth. As Ackerman himself, in his more modest moments, admits, grand theory offers a model, a hypothesis—really a tool for shedding new light on and helping

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67. Sandalow, *supra* note 53, at 335.

68. Sherry, *supra* note 58, at 918, 933.

69. Klarman, *supra* note 61, at 765.

70. Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law at 1 (1988).

71. *Id.* at 88.

us come to grips with its subject.[72] Grand theory begins with a building upon a selected past from which it is distilled. Its terms are more prescriptive and linguistic than essentialist, not so much predictive as hortatory.[73] In its building it is an imaginative and interpretive foray into the past, and so always subject to dispute, and we can ask only that it be, within our tradition, a plausible way of selecting and looking at the data. Its distillation must involve rational inference. Its application should provide fresh insight and, within our legal culture, a satisfying (and good) narrative. It should ring true rather than be true. It is more hermeneutic, rhetorical, and poetic than scientific. Indeed, it is at its weakest when it pretends to be quantitative.[74] Grand theory can never wholly capture an ongoing political and intellectual tradition as complex and organic as our constitutional law nor dissolve the ineradicable tensions inherent in it. It does much if it brings its subject into new relief and suggests a coordinating vision of our constitutional past with which we can be comfortable as we turn again to the future. In a sense it proposes a belief system more than a body of information, a symbolic paradigm for ordering our understanding and our future. Who but a deep down formalist, ever to be disappointed, could expect more? No one thing is true except the idea that no one thing is true—in law at least.

With our demands thus scaled down or shifted, what does Ackerman do for us?

For one thing, he confronts our predominant constitutional myth[75] and provides provocative correctives. No student of American constitutional law has been comfortable with the standard version of our post-reconstruction and New Deal history. He calls "change" change but avoids easy cynicism as he seeks to make it licit within our constitutional faith. In order to do so, he offers a plausible synthesis of the tension

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72. ACKERMAN, *supra* note 2, at 159, 142.

73. More generally, grand theory may be attacked, especially insofar as it is descriptive and predictive, as suffering from the defect of "brilliance." Daniel Farber, *The Case Against Brilliance*; 70 MINN. L. REV. 917 (1986); *see also* Daniel Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987). A "brilliant" idea is a new, startling and counterintuitive explanation of intentional phenomena which stands conventional understanding on its head. Farber's argument, which itself might be called "brilliant" (but see his defense at 70 MINN. L. REV. 930, n.56), is that the very nature of the brilliant idea — new, previously unthought of — makes it probably untrue, at least as an explanation of what is really going on in past legal phenomena. If it really explained what was going on it would presumably have been recognized by the lawmakers in which case it would be a commonplace. At the least, Farber's notion robs "brilliant" ideas of much of their predictive, if not of their exhortative power.

74. *See, e.g.*, ACKERMAN, *supra* note 2, at 274.

75. *See* ACKERMAN, *supra* note 2, at 36. I use "myth" here as Ackerman does: not as a mystification but as the necessary collective narrative we tell ourselves in the ongoing effort to define ourselves.

between popular democracy and individual rights, a synthesis which usefully illuminates—though it can never dissolve—the countermajoritarian tension: the Court guards the reserved sovereignty of the People and of the individual. The synthesis fits nicely our intellectual tradition. Does it rest too exclusively on the *Federalist*? But why should scholars ordinarily so jaded about original intent deny a selective mining of our past for the "best" view among many? His reading of the *Federalist* is really quite compelling.

A second merit is that he sets his theory within tradition, a setting which he quite rightly defends as all we have and as quite essential to any thought at all.[76] By tradition we mean a set of common experiences, terms, problems, explanations, and assumptions—"a narrative of inquiry and debate."[77] It is not that tradition is sacred.[78] Rather, to be out of tradition is to be wholly deracinated—out of society, out of words and out of thought.

The attack upon the relevance of tradition sometimes takes the form of a plea on behalf of the People to be free of the bonds of prior generations—really an extreme form of "monism." Thus, Klarman asks why we should privilege "yesterday's voice of the People over today's voice of the People's 'stand-ins' (that is, our elected representatives)"?[79] And answers that "there is no convincing reason why one generation should be bound by constitutional constructions imposed by its predecessors."[80] These sorts of questions and answers which have gained especial currency in these times of passionate if self-refuting attacks on western, so-called white-male, culture are perhaps useful in asking us to think about our past, but somehow seem quite especially either sophomoric or disingenuous in the present context. Does Klarman really believe that one generation should not be at least presumptively bound by its predecessors? We are bound in part for the same reasons we are bound to play baseball by the rules. But in any case, when would a generation be free to disregard the past? What is a generation? Generations do not issue forth in neat cohorts upon the coincident demise of ancestors. The People come in an overlapping chain and is organic across generations. What would a polity be like without a presumptively binding past? Could it be called constitutional in any important sense?

Ackerman's defense of tradition reveals a third of his offerings: a dynamic constitution and an optimistic exordium. Our past calls for

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76. ACKERMAN, *supra* note 2, at 300.

77. *See* ALASDAIR MCINTYRE, WHOSE JUSTICE? WHICH RATIONALITY at 350 (1988).

78. ACKERMAN, *supra* note 2, at 21.

79. *See* Klarman, *supra* note 61, at 765.

80. Klarman, *supra* note 61, at 793. Predictably, Klarman invokes Jefferson's musings on the value of fresh starts for each generation.

presumptive respect but critical analysis.[81] Our tradition carries us well-armed into the future.

Others of Ackerman's theoretic components also are noteworthy. His model of normal politics and the private citizen ordinarily going about daily life with only a fitful attention to politics rings true.[82] It also provides a means of taming the more Jacobin overtones in the recent revival of civic republicanism which at times seems to call for a kind of illiberal and collectivist polis,[83] a vision surely cross-grained to our common faith in individual liberty. His exposure of the dominant professional narrative raises provocative questions about the canonicity of our constitutional law and especially how it is shaped by the standard casebook. His description of the judicial mode of intergenerational synthesis, felicitously captured in the railroad metaphor earlier set out, casts a fresh light on past cases and eras and upon the judicial task.[84]

All of this is not to deny that grand theory invites testing. That is one of its roles. Many of the criticisms previously summarized are trenchant and surely useful to Ackerman as he proceeds to fill out his project and we may properly expect answers to many questions in succeeding volumes. One might indeed wonder what to make of his portrayal of Douglas' opinion for the Court in *Griswold* as a skillful synthesis of three great jurisgenerative eras. Were these Douglas' thoughts? His instincts? Can Ackerman's version somehow escape Farber's critique of brilliance?[85] What is the interpretive scope left for the preservationist court? How can he, in light of the primacy which he accords the People engaging in higher-lawmaking, imagine the possibility of a new bill of rights forever entrenched against amendment?[86] Would we be better off redomesticating constitutional change in a revision of Article V somewhat along the lines he sketches rather than remaining subject to the uncertainties of the extra-legal passage, a phenomenon only recognizable in retrospect and for which we surely pay a price? Why did the Framers, if dualists at heart, see a need for Article V? Then too one might wish for a keener attention to the very meaning of amendment and how it fits within the degrees of constitutional change

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81. ACKERMAN, *supra* note 2, at 316.

82. ACKERMAN, *supra* note 2, at 230.

83. *See, e.g.*, Steven G. Gey, *The Unfortunate Revival of Civil Republicanism*, 141 U. PA. L. REV. 801 (1993); James W. Torke, *What Price Belonging: An Essay on Groups, Community and the Constitution*, 24 IND. L. REV. 1 (1990).

84. ACKERMAN, *supra* note 2, at 98-99.

85. *See* Farber, *supra* note 73.

86. For an interesting discussion of this puzzle of constitutional entrenchment, *see* PETER SUBER, THE PARADOXES OF SELF AMENDMENT: A STUDY OF LAW, LOGIC, OMNIPOTENCE AND CHANGE § 9 (1990). Suber also compiles a list of several methods of constitutional amendment. *See id.* §§ 14-19.

that trouble our civic faith. This is a puzzle a book about constitutional change should try to solve.[87] As for the uses of history to confirm the dualist thesis, we must await his next volume; but if the reader awaits some apodictic demonstration he is sure to be disappointed. A rich, plausible and thought-provoking narrative and argument will do. As lawyers should know, there isn't any more to be had.

We The People: Foundations is itself the foundation of a grand theory about constitutional law and constitutional change. Whether Ackerman is a liberal on the ropes or an originalist seems beside the point. When the project is complete we may ask whether it gives us a coordinated vision of our past and future. What he calls for so far is,

> An exercise of judgment, a recognition of the rightful superiority of those higher laws that have a more plausible claim than others to be acts of the people themselves, even though the claim can be no more than plausible. He has exercised his own judgment in discerning the occasions where we should suspend our disbelief, give our faith, and say that the people have acted. In doing so he has given us a fresh and convincing view not only of our constitutional history but of our will to believe.[88]

I think he's made a pretty fair beginning.

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87. *See* Levinson, *supra* note 64.
88. Morgan, *supra* note 51, at 48.